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No. 59821-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION 1

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION,

Respondent/Plaintiff

v.

LESCHI CORP.,

Appellant/Defendant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The Superior Court erred by denying Appellant/Defendant Leschi Corp.'s motion to enforce the arbitration agreement and stay trial court proceedings.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the arbitration agreement in the Purchase and Sale Agreement ("PSA") between the homeowners and Leschi Corp. should be enforced to resolve claims brought by Respondent/Plaintiff The Pier at Leschi Condominium Owners Association ("HOA")
   a. The PSA requires the purchasers of condominium units and Leschi Corp. to resolve all construction-related disputes by binding arbitration.
   b. The Limited Warranty, incorporated by reference into the PSA, requires the individual homeowners, their representative association and Leschi Corp. to resolve all construction-related disputes by binding arbitration conducted pursuant to the Federal Arbitration Act, 9 U.S.C. *et seq.* ("FAA").
   c. The Public Offering Statement ("POS") and the Condominium Declaration ("Declaration"), incorporated by reference into the PSA, require the purchasers, the HOA and Leschi Corp. to resolve all construction-related disputes by binding arbitration.
   d. The homeowners' construction-related claims, based on the

Consumer Protection Act ("CPA"), implied warranty of habitability, and duty to disclose latent construction defects, must be resolved by binding arbitration.

e. Judicial economy dictates all remaining claims should be resolved by binding arbitration.

2. Whether the Washington Condominium Act, ch. 64.34 RCW ("WCA"), which provides for judicial enforcement of statutory condominium warranties, is preempted by the FAA, where the sales contract and incorporated documents substantially involve interstate commerce.

a. The PSA transferred title to real property partially constructed by out-of-state subcontractors using materials transported across state lines.

b. The PSA transferred title to appliances and fixtures manufactured and warrantied by out-of-state entities and transported across state lines.

c. Four PSAs expressly transferred Washington real property to out-of-state purchasers, several of whom effected the purchase for investment purposes only.

d. Nine purchase transactions relied on the interstate transfer of funds by out-of-state financial institutions.

e. The transactions involved easements granted to out-of-state cable television and broadband service providers.

f. The transactions required an aquatic land lease, conditioned

on a performance bond issued and guaranteed by an out-of-state entity.

g. The Limited Warranty is administered across state lines.

3. Whether the Superior Court's decision should be reversed when this Court has seriously questioned its holding in *Marina Cove*.

a. This Court has called *Marina Cove* into question because it was based on a narrow interpretation of interstate commerce.

b. *Marina Cove* was the principal authority the HOA relied upon before the Superior Court.

4. Whether trial court proceedings should be stayed pending binding arbitration.

a. Once a party files a motion to enforce contractual arbitration, the court must stay judicial proceedings involving claims subject to the requested arbitration until the court renders a final decision on arbitration.

b. If the court ultimately orders arbitration, judicial proceedings are stayed pending completion of the arbitration proceeding.

5. Whether reasonable attorney fees and costs should be awarded to Leschi Corp. on appeal.

III. STATEMENT OF THE CASE

1. Introduction

This appeal arises out of construction defect litigation commenced by the HOA on behalf of its member homeowners, for

claims arising from conversion of The Pier at Leschi ("The Pier"), a condominium located in Seattle. *Clerk's Papers ("CP") 3–10.* Leschi Corp. respectfully requests reversal of the Superior Court's order denying enforcement of the arbitration provisions of the PSA, and other incorporated condominium sales documents, including the Limited Warranty, POS and Declaration. Leschi Corp. also requests that all judicial proceedings, including RCW 64.55 non-binding arbitration, be stayed pending arbitration, and that Leschi Corp. be awarded its reasonable attorney fees, costs and expenses for bringing this appeal.

2. The Parties

Appellant/Defendant Leschi Corp. is a Washington corporation that acted as the declarant and general contractor of the conversion of The Pier. *CP 344–45.*

Respondent/Plaintiff The Pier at Leschi Condominium Owners Association ("HOA") is a Washington non-profit corporation with membership comprised of and limited to all individual homeowners at The Pier. *CP 3, 478.*

3. The PSA Specifications Involved Interstate Commerce

The Pier is a condominium consisting of 28 units which was converted from pre-existing rental apartments by Leschi Corp. from 2001 to 2003. *CP 12, 384, 402, 414.* Leschi Corp., as general contractor, hired several specialty subcontractors to perform the

installation of the upgrades in the conversion. Two subcontractors hired by Leschi Corp. were out-of-state entities: Haulaway Storage Containers, Inc., a California corporation; and Labor Express Temporary Services, a registered trade name for Arizona Labor Force, Inc., an Arizona corporation. *CP 94–100, 346.* Unit sales occurred between November 2001 and July 2003. *CP 402.*

Sale of the units was governed by specifications for new or replacement elements in the units, common elements, and limited common elements. The purchase price was "based on Seller's standard color plan, carpet, appliance and finish work specifications." *CP 356 ¶ 11.*[1] The PSAs specifically indicate the sales transaction included transfer of ownership of a stove/range, refrigerator, washer, dryer, dishwasher and microwave. *See, e.g., PSA Specific Terms, at CP 350, 369, 371.* In addition to those appliances, the wall-to-wall carpeting, installed electrical fixtures, and many other fixtures were expressly included in the sales transactions. *See ¶ c, at CP 351.* The transactions included assignment of the manufacturer warranties for the installed "appliances, fixtures and items of equipment" to the unit purchasers. *CP 394.*

As part of the PSA, the detailed conversion specifications included descriptions of appliances, plumbing fixtures, door

[1] Appears as numeral "1" in the Clerk's Papers.

hardware, carpeting, siding, tiles, grout and other interior and exterior finishing materials. *CP 414–27.* Out-of-state entities manufactured most of these items, which were necessarily transported across state lines into Washington for installation in The Pier conversion project. *CP 102–204.* The interstate manufacture, sale and transportation necessary to convert the apartments into the finished condominium included the following out-of-state appliances, components and materials, grouped by state of incorporation of the manufacturer:

California: The specifications for the exterior common walks require elastomeric deck coating manufactured by MCP Chemicals International, Inc., a California corporation. *CP 122, 415.* MCP Chemicals has facilities in Kansas, Texas, and California. *CP 123.* The bathroom lighting fixtures are specified as "Minka Lavery," manufactured by Minka Lighting Inc., a California corporation headquartered in California, with national distribution centers located in California and North Carolina. *CP 165–68, 418.* The interior hallway and bedroom closet lighting fixtures are specified as "Maxim," manufactured by Maxim Lighting International, Inc., a California corporation with mailing address there. *CP 169–71, 418.*

Connecticut: The specifications require "Laticrete" field and bathroom tile grouts, which are manufactured by Laticrete International, Inc., a Connecticut corporation with headquarters in that state. *CP 149–51, 417, 421–24, 426.* Laticrete's warranties

are administered from Connecticut. *CP 152.*

Delaware: The specifications require Bosch washer/dryers, which are manufactured by BSH Home Appliances Corporation, a Delaware corporation. *CP 117, 414.* The warranties for the Bosch appliances are administered from California. *CP 118.* The specifications require "Hydroment" for kitchen counter and utility tile grouts, which are products manufactured by Bostik Inc., a Delaware corporation, with plants in Wisconsin and Georgia. *CP 146–48, 417, 422, 426.* The deco tiles in one of the penthouse's master bath tub/shower are specified as "Florida Tile," manufactured by Florida Tile Ceramic, Inc., a Delaware corporation with principal address in Florida. *CP 199-200, 415.* The toilets are specified as "Kilgore," manufactured by Mansfield Plumbing Products, LLC, a Delaware limited liability company with manufacturing plants in Ohio and Texas. *CP 185–87, 419.*

The exterior front elevation lighting fixtures are specified as "Progress Lighting," which are manufactured by Progress Lighting Inc., a Delaware corporation with headquarters in South Carolina. *CP 153–55, 418.* The exterior hallway, deck and entry door lighting are specified as "Craftmade," manufactured by Craftmade International, Inc., a Delaware corporation with main office in Texas. *CP 156–58, 418.* The kitchen lighting fixtures are specified as "Juno," manufactured by Juno Lighting, Inc., a Delaware corporation with an Illinois address and offices in New Jersey,

Texas, Indiana, Georgia, California, and Canada. *CP 159–62, 418.*

Georgia: The living room, dining room, and bedroom wall-to-wall carpeting is specified as "Home Foundations–Devonshire II." *CP 415–16, 421–22, 424–25.* Shaw Industries, Inc., a Georgia corporation, manufactures this carpeting. *CP 129–33.* Outdoor carpeting for the main stair landings is specified as manufactured by Van Dijk Carpet, Inc., a Georgia corporation with a Georgia manufacturing plant and mailing address. *CP 124–25, 415.* Carpet warranty claims are made directly to Van Dijk. *CP 127-28.*

Illinois: The 12" x 12" ceramic tile in several penthouse bathrooms is specified as "Crossville," manufactured by Crossville, Inc., an Illinois corporation with manufacturing plant and product warranty administration in Tennessee. *CP 191–94, 421, 426.* Penthouse utility tile grout is specified as "Mapei," manufactured by Mapei Corporation, an Illinois corporation with principal place of business and product warranty administration in Florida. *CP 196–98, 415.* Kitchen sinks are specified as "Elkay," manufactured by Elkay Manufacturing Co., an Illinois corporation with warranty administration in that state. *CP 178–81, 419.*

Indiana: Kitchen and bathroom faucets are specified as "Delta," manufactured by Delta Faucet Corporation, an Indiana corporation with a Michigan address and warranty administration from Indiana. *CP 182–84, 419.*

Minnesota: Grout for the kitchen counters and bathroom floor

tiles are specified as "Tec," which are manufactured by TEC Specialty Products, Inc., a Minnesota corporation with main office in Illinois and warranty disputes actionable in Minnesota. *CP 136–40, 416–17, 421, 423–24, 426.*

Nevada: Exterior siding specifications require "Hardi lap siding," with "Hardi shingle accents," products manufactured by James Hardie Building Products, Inc., a Nevada corporation based in California. *CP 188–190, 420.*

New Jersey: The vinyl floor covering is specified as "Mannington," which is manufactured by Mannington Mills Inc., a New Jersey corporation with its headquarters and warranty administration from that state. *CP 141–45, 416–17.* The door hardware is specified as "Schlage," which is manufactured by Ingersoll-Rand Company, a New Jersey corporation with warranty administration in Kansas. *CP 172–77, 418.*

New York: The specifications require General Electric range/ovens, microwaves, dishwashers, and refrigerators installed in the unit kitchens. *CP 102–116, 414.* General Electric Company is a New York corporation with warranties provided from Kentucky. *CP 107, 110, 113, 116.*

Virginia: The deck doors are specified as "Benchmark," which are manufactured by Benchmark Corp., a Virginia corporation with warranty administration from that state. *CP 120–21, 415.*

Canada: The cabinets are specified as "Norelco Cabinets,"

which are manufactured by Norelco Cabinets, Ltd. a British Columbia company. *CP 133, 414.* The specifications for acoustic floor underlayment beneath the hardwood flooring in the entry, entry hall, and kitchen require installation of "Dura:Son," manufactured by Dura Undercushions Ltd., a Quebec company with warranty administration from Canada. *CP 134–35, 415, 417, 421–22, 424–25.* Installed dining room lighting is specified as "Pendant # MP Lighting," which MP Lighting, a British Columbia company, manufactures in Canada. *CP 163–64, 418.*

The specifications for penthouse kitchen countertops require "Michelangelo" slab granite, manufactured by Michelangelo Marble & Granite Co. Ltd., a Saskatchewan company. *CP 195, 424, 426.* A penthouse kitchen counter tile grout is specified as "Flextile," manufactured by Flextile, a Canadian company with offices in Toronto and British Columbia. *CP 201-04, 426.*

Significantly, the HOA's RCW 64.50 notice of defects implicated problems with products supplied by at least two of the above-mentioned out-of-state manufacturers. The elastomeric deck coating is alleged to be "split at the metal edge flashing, allowing water intrusion." *CP 12.* This coating was manufactured by California corporation MCP Chemicals. There is also an allegation of water intrusion around the windows, *CP 12*, which may involve the Hardi siding products manufactured by Nevada corporation James Hardie Siding Products.

4. The PSAs Involved Interstate Property Transfers

Four PSAs involved interstate commerce on their face, in that they were purchased by out-of-state residents. *CP 350, 366–71.* Two Virginia residents, the Moores, represented in their PSA that they purchased two units at The Pier as "investment property," not as their residences. *See ¶ 33, at CP 358.* Therefore, it is reasonable to assume that they leased the two units to renters, who paid their rent to the Moores via interstate fund transfer.

Further evidence of interstate commerce in the Moores' PSAs is the express requirement that the transaction be a so-called "1031 Starker Exchange," which permits an exchange of like-kind investment property with no gain or loss recognized under Internal Revenue Code section 1031.[2] *CP 360.* The PSA indicates this exchange was facilitated by Investor Title Exchange Corporation, a company located in North Carolina. *CP 360, 365.* To accomplish this transaction, the Moores' PSA, funds and correspondence documenting the 1031 exchange were all transferred via interstate commerce. *Id.* Similarly, interstate commerce was involved in nine sales transactions when California, Maryland, Michigan and New Jersey lenders provided the financing for the purchase of the units. *CP 348, 429–37.* In addition, easements for cable television and

[2] Internal Revenue Code section 1031 states in pertinent part: "No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment." 26 U.S.C. § 1031(a)(1).

broadband services were granted to out-of-state entities. *CP 92, 345–46, 373–78.*

The PSAs assigned boat slips on The Pier's boat dock to the purchasers. *See CP 365; ¶ 4, at CP 369.* Because the dock is located over submerged state aquatic lands, Leschi Corp. executed a long-term lease of those lands with the State. *CP 410–12.* The Hartford Fire Insurance Co., a Connecticut corporation, provided the performance bond guaranteeing the lease. *CP 404–09.*

5. The PSAs Involved Federal Regulations

Federal statutes and regulations control various elements of the property transfer, as required by the PSA. For example, the PSA specifically requires that the escrow fee "shall be paid according to FHA or VA regulations" if the sale is FHA or VA financed. *See ¶ h, at CP 352.* The seller is required to provide "information on Lead-Based Paint and Lead-Based Paint Hazards" to the purchaser.[3] *See ¶ k, at CP 351.* HUD-1 forms issued by the U.S. Department of Housing and Urban Development ("HUD") were used for settlement of the transactions, as required by the Real Estate Settlement Procedures Act ("RESPA").[4] *See CP 366, 368, 370.*

[3] The federal statute requiring lead-based paint information be provided to homeowners states: "[T]he Secretary . . . of the Environmental Protection Agency shall promulgate regulations . . . for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. The regulations shall require that, before the purchaser . . . is obligated under any contract to purchase or lease the housing, the seller or lessor shall . . . provide the purchaser . . . with a lead hazard information pamphlet . . . ." 42 U.S.C. § 4852d(a)(1)(A).

[4] 12 U.S.C. §§ 2601–2617.

Significantly, the Limited Warranty binding arbitration provision specifically provides notice that the FAA governs the arbitration proceeding. *See CP 393*. This is further evidence of interstate commerce, because in addition to the fact that Professional Warranty Service Corporation ("PWC"), a Virginia corporation, administers the binding arbitration, *see CP 90, 387*, it is clear that Washington statutes do not solely govern the sales transactions, but federal statutes apply as well.

6. <u>The PSA Reflects the Parties' Arbitration Agreement</u>

The PSA and its incorporated sales documents expressly require binding arbitration of construction-related disputes between the parties.

a. The PSA requires binding arbitration of construction-related disputes.

Leschi Corp. and each unit owner executed PSAs with multiple provisions requiring binding arbitration as the contractual dispute resolution process for all disputes. The contract contains express binding arbitration provisions as the sole remedy for all disputes relating to construction quality, as follows:

> 15. WARRANTIES. Owner acknowledges and agrees: ....
> i. That the Limited Warranty provides an Alternative Dispute Resolution process (involving **mandatory and binding arbitration**) to resolve all disputes involving construction quality;

Standard Addendum to Condominium PSA ("Standard Addendum")

¶ 15.i, at CP 357 (emphasis added). A Limited Home Warranty Addendum ("Home Warranty Addendum") incorporates the Limited Warranty into the PSA for each purchaser.[5] The Limited Warranty is:

> given by the Seller and accepted by the Buyer (i) in lieu of and to the exclusion of all other express or implied warranties (including without limitation any implied warranty of habitability, merchantability or fitness for a particular use); and (ii) in lieu of and to the exclusion of all other legal or equitable rights, remedies or causes of action.

Home Warranty Addendum ¶ e, at CP 489–514. That addendum also contains a provision requiring the Limited Warranty govern resolution of all construction-related disputes:

> Buyer further acknowledges and agrees: ....
> i. That the Limited Warranty provides an Alternative Dispute Resolution process (involving mandatory and **binding arbitration**) to resolve all disputes involving construction quality;

Id. ¶ i, at CP 489–514 (emphasis added).

The PSA also requires mediation and binding arbitration for resolution of construction issues, as provided by the Limited Warranty, and separate provisions for dispute resolution procedures for non-construction issues:

> 31. MEDIATION/ARBITRATION. All disputes involving Seller, Buyer and/or Owners Association shall be resolved by the

[5] The Home Warranty Addendum signed by the purchaser of Unit 301 could not be located after a diligent search. *See ¶ 4 at CP 474.* However, that owner must have executed such an addendum because PWC issued a Limited Warranty Validation Form to the owner of that unit on Nov. 30, 2001. *See CP 583.*

mediation/**arbitration provisions** of the Limited Warranty for construction issues (whether based on express or implied warranties); or the Declaration for non-construction issues.

Standard Addendum ¶ 31, at CP 358 (emphasis added).

b. The POS requires binding arbitration of construction-related disputes.

The purchasers expressly agreed that the provisions of the POS and Limited Warranty are a part of the basis of the parties' bargain and are binding on the purchaser with respect to both the units and the common elements. *See POS Acknowledgement ¶ 4, at CP 354; Standard Addendum ¶ 15.k, at CP 357.* The POS includes a provision requiring binding arbitration as the construction quality dispute resolution procedure to be used:

Buyer acknowledges and agrees: ....
g. that the Limited Warranty provides an Alternative Dispute Resolution process (involving mandatory and **binding arbitration** in lieu of judicial proceedings) to resolve all disputes involving construction quality;

POS ¶ 25.g, at CP 383 (emphasis added).

c. The Limited Warranty requires binding arbitration of construction-related disputes under the FAA.

The Limited Warranty, incorporated by reference into the PSA, expressly requires binding arbitration as the sole remedy to resolve disputes regarding construction or sale of the units:

Any disputes between YOU and US, or parties acting on OUR behalf, including PWC, related to arising from this LIMITED WARRANTY, the construction of the home or the sale of the HOME will be resolved by **binding arbitration**. **Binding arbitration** shall be the sole remedy for resolving

disputes between YOU and US, or OUR representatives....

Limited Warranty sec. VIII, at CP 392 (emphasis added). The types of claims subject to binding arbitration include, but are not limited to, disagreements about whether a condition is a construction defect covered by the Warranty or whether it has been corrected; alleged breach of the Limited Warranty; allegations of CPA violations, unfair trade practice or other statutory violations; allegations of fraud, breach of duty of good faith, or other common law claims; and disputes concerning issues to be submitted to binding arbitration, timeliness of performance requests, and arbitration fee payment or reimbursement. *Id.*

The Limited Warranty provides a form for homeowners to use when requesting binding arbitration, which states as follows:

> I/we are hereby requesting PWC to initiate an arbitration to determine the builder's obligations with respect to the above identified issues under the terms of the LIMITED WARRANTY and under applicable federal, state, and local law regarding the LIMITED WARRANTY. I/we understand that the arbitration award will be final, binding and enforceable as to both the homeowner and the Builder, except as modified, or vacated in accordance with applicable rules and procedures of the designated arbitration organization, or, in their absence, the United States Arbitration Act (9 U.S.C. § 1 et seq.).

Binding Arbitration Request Form, at CP 397. The Limited Warranty applies to the first purchaser of the unit from Leschi Corp. and extends to all subsequent owners who take title to the unit within the remaining warranty period. *See ¶ IX.B, at CP 394.* A

homeowner wishing to transfer Limited Warranty coverage must obtain the subsequent buyer's agreement, as follows:

> I/we acknowledge and agree that all disputes under or in any way relating to the HOME BUILDER'S LIMITED WARRANTY (including without limitation, disputes as to what issues shall be submitted to arbitration; alleged breach of the HOME BUILDER'S LIMITED WARRANTY; and alleged violations of any statutes or regulations pertaining to consumer protection or unfair trade practices) shall be submitted to binding arbitration... as provided for in the HOME BUILDER'S LIMITED WARRANTY. The decision of the arbitrator(s) in all such cases shall be final and binding upon the parties to the arbitration.

Subsequent Home Buyer Acknowledgement and Transfer Form, at CP 398. Significantly, the Limited Warranty binding arbitration provision is expressly "governed by the United States Arbitration Act (9 U.S.C. §§ 1–16) to the exclusion of any inconsistent state law, regulation or judicial decision." *CP 392.*

A Virginia corporation, PWC, administers the entire Limited Warranty on behalf of Leschi Corp. *CP 88–91, 387.* The terms of the Limited Warranty, are themselves incorporated into the sales transactions and provided on a form issued by PWC. *See CP 387 ("PWC Form No. 117 Rev. 05/01").* As part of this administrative process, the homeowners each submitted a registration form by sending it to PWC in Virginia. *See Birmingham Decl. ¶ 9, at CP 346; Home Builder's Limited Warranty Registration Form, at CP 400.* After each homeowner's registration form was received by PWC, it returned a Limited Warranty Validation Form across state

lines to the homeowner. *CP 579–607.* These exchanges of documents, required by the PSA and Limited Warranty, are part of the transactions and involved interstate commerce.

PWC currently maintains records pertinent to each valid Limited Warranty in its Virginia office. *See Ellis Decl. ¶ 3, at CP 579.* The arbitration service to be used for resolution of disputes under the Limited Warranty is Construction Arbitration Services, Inc.,[6] or other arbitration service to be selected by PWC when the arbitration request is submitted. *See CP 393.* Warranty coverage was still in effect for all of the units when the HOA first served its RCW 64.50 notification on November 14, 2005. *See CP 67, 579–607.*

d. The Declaration requires binding arbitration of construction-related disputes.

A condominium declaration must present "Any restrictions in the declaration on use, occupancy, or alienation of the units." RCW 64.34.216(1)(n). Here, the Declaration presents the restriction that the homeowners and their HOA may not use a judicial remedy to resolve disputes with the declarant Leschi Corp. Instead, it requires the parties to participate in binding arbitration as the sole remedy upon the failure of negotiations, as follows:

> 24.1 Policy – Mediation. . . . [I]f a dispute arises, the parties agree to resolve all disputes by the following alternate dispute resolution process: (a) the parties will seek a fair and prompt

[6] Judicial notice may be taken that Construction Arbitration Services is not a Washington corporation and its office is located in Michigan. ER 201(d); *see* Appendix 6.

> negotiated resolution, but if this is not successful, (b) **all disputes shall be resolved by binding arbitration** . . . . The parties confirm that by agreeing to this alternate dispute resolution process, they intend to give up their right to have any dispute decided in court by a judge or jury.
>
> 24.2 **Binding Arbitration**. Any claim between or among any party subject to this Declaration (including without limitation, the Declarant, Association Board or officers, Unit Owners, or their employees or agents) arising out of or relating to this Declaration, a Unit or Units, the Condominium or Association shall be determined by Arbitration in the county in which the Condominium is located commenced in accordance with RCW 7.04.060 . . . . Whether a claim is covered by the Article shall be determined by the arbitrator(s). . . .

Declaration ¶¶ 24.1–24.2, at CP 485–86 (emphasis added).

7. Procedural History

The HOA first filed an RCW 64.50 Notice of Claims in November 2005, alleging water intrusion issues and certain defects in the pier and dock. *CP 67–68.* In March 2006, the HOA filed a Complaint against Leschi Corp. *CP 3–10.* The HOA's causes of action may be divided into two categories: those alleging violations of the WCA;[7] and those alleging common law or other statutory claims.[8] *CP 5–9.* In June 2006, the HOA filed a second RCW 64.50 List of Known Construction Defects. *CP 11–21.* To preserve

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[7] The HOA's claims under the WCA are breach of express and implied warranties, RCW 64.34.443, .445; misrepresentations/omissions in the POS, RCW 64.34.410, .415; violation of duty to provide documentation, RCW 64.34.312; failure to maintain and repair common elements during period of declarant control, RCW 64.34.344, .328; and failure to disclose alleged physical hazards, RCW 64.34.405, .410, .415.

[8] The HOA's non-WCA claims are breach of implied warranty of habitability; breach of duty to disclose latent construction defects; and violation of the CPA, RCW 19.86.020 *et seq.*

its right to conduct non-binding arbitration, in September 2006 Leschi Corp. filed a Demand for Arbitration, pursuant to RCW 64.55.100, and answered the Complaint in January 2007, asserting an affirmative defense that, "All disputes are subject to arbitration." *CP 22–44.*

On February 7, 2007, Leschi Corp. filed its motion to enforce binding arbitration under the express terms of the PSA and incorporated sales documents, and stay court proceedings pending arbitration. *CP 45–59.* Following a hearing with oral argument on March 16, 2007, the Superior Court denied Leschi Corp.'s motion. *CP 620–22.* Leschi Corp. requests the Court reverse the trial court's order and remand with instructions that all claims be subject to binding arbitration, pursuant to the PSA and Limited Warranty, and that all judicial proceedings, including RCW 64.55 non-binding arbitration, be stayed pending completion of the arbitration.

IV. ARGUMENT

1. Standard of Review

Review of trial court decisions on motions to compel arbitration is de novo. *Satomi Owners Ass'n v. Satomi, LLC*, 159 P.3d 460, 463 (Wash. App. Div. 1, 2007).

Here, Leschi Corp. contends that the PSA and the incorporated Limited Warranty, POS, and Declaration require all disputes relating to construction, including the claims brought by the HOA,

be resolved by binding arbitration. There is no transcript of proceedings and the Superior Court issued no findings or conclusions on which it based denial of Leschi Corp.'s motion to enforce the arbitration agreement. *CP 621–22.*

2. Arbitration Agreement Between the Homeowners and Leschi Corp. Should Be Enforced to Resolve All Claims Brought by the HOA.

It is well settled under Washington law that legally valid contracts shall be enforced in accordance with their terms. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 173, 94 P.3d 945 (2004). There is a strong public policy favoring arbitration of disputes "to avoid the formalities, the expense, and the delays of the court system." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002) (citations omitted); *see Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 160, 516 P.2d 1028 (1973). Parties must submit claims to arbitration if the parties have "written agreements" to arbitrate. *Mendez*, 111 Wn. App. at 454, 45 P.3d 594. The settled law in Washington is that CPA and other statutory claims are subject to arbitration under the FAA. *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 590, 681 P.2d 253 (1984) .[9]

This Court recently addressed the issue of whether contract and

[9] *Garmo* expressly overruled *Wineland v. Marketex Int'l, Inc.*, 28 Wn. App. 830, 627 P.2d 967 (1981), a case where the court had held that a contract arbitration clause could not require arbitration of a CPA claim. 101 Wn.2d at 587, 590, 681 P.2d 253.

common law claims brought by a condominium homeowners association are arbitrable, and decided that they are. *Satomi*, 159 P.3d at 469. Thus, there can be no dispute that the CPA and common law claims must be submitted to binding arbitration pursuant to the parties' arbitration agreement. The trial court erred by deciding otherwise.

a. The PSA requires purchasers of the condominium units resolve all construction-related disputes by binding arbitration.

There is no dispute that the individual homeowners executed valid PSAs with Leschi Corp. These PSAs, otherwise identical as to the terms requiring dispute resolution, require that disputes involving construction-related claims between Leschi Corp. and the homeowners be resolved by binding arbitration. The parties mutually agreed that binding arbitration is the sole remedy for resolution of all construction disputes. Significantly, the PSA specifically requires binding arbitration to resolve disputes involving construction quality. The Limited Warranty, POS and Declaration, all incorporated by reference into the PSA, require the purchasers, the HOA and Leschi Corp. to resolve all construction-related disputes by binding arbitration.

All claims brought by HOA, on behalf of its homeowner members, against Leschi Corp. are inherently related to the quality of the conversion construction undertaken by Leschi Corp., and the

alleged lack of disclosure thereto. *See Complaint, at CP 3–10; List of Defects, at CP 11–21.* Thus, all claims in this matter fall squarely under the PSA binding arbitration provisions and must be resolved pursuant to the procedures in the arbitration agreement.

The Limited Warranty, accepted as part of the basis of the bargain by all purchasers pursuant to the PSA and POS, requires arbitration of all construction warranty disputes. The HOA, in representing the interests of the individual unit owners in this matter, is bound by the express terms of the contracts executed by its members relating to binding arbitration. This Court concluded that a condominium homeowner's association "stands in the shoes" of the individual homeowners and brings claims on its members' behalf as their organizational representative. *Satomi*, 159 P.3d at 463–64.

The closing of the real estate sale is conclusive evidence that the unit purchasers received and approved the POS, including the Declaration, as follows:

> Buyer shall be conclusively deemed to have approved the Public Offering Statement unless, within 7 days following receipt, Buyer gives notice of disapproval of the same.

¶ v, at CP 353. Additional evidence of the purchasers' receipt of the POS, Warranty, and Declaration in conjunction with the PSA is provided in the POS Acknowledgement form. *CP 354.* POS Exhibit B is described in that form as "Warranty (Which includes

disclaimers, exclusions and modifications of the Washington Condominium Act implied warranties, and an alternative dispute resolution process.)" *Id.* The purchasers agreed they could only rely on the representations, warranties and agreements contained in the PSA, POS, Limited Warranty and Declaration, and "any other written documents signed by the Declarant." *Id. ¶ 3.* The condominium documents "are legally binding obligations of the Purchaser," and the purchasers are advised to seek the assistance of legal counsel. *Id. ¶ 4.* Signing the POS Acknowledgement is an agreement by the purchasers that the POS, Warranty, and Declaration "are a part of the basis of the parties' bargain and are binding upon the Purchaser." *Id.* These provisions are repeated in the Standard Addendum. *¶ 15.c–e,*[10] *at CP 356.*

Here, the HOA's claims include alleged CPA violations, breaches of WCA and contractual warranties, breach of the implied warranty of habitability, and breach of the duty to disclose latent construction defects. As in *Satomi*, none of the HOA's claims belongs exclusively to it, so the HOA "necessarily brought this action in a representative capacity, not on its own behalf as a separate juristic entity."[11] *See Satomi*, 159 P.3d. at 464.

In light of the repeated references to binding arbitration

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[10] Appears as "5.c–e" in the Clerk's Papers.

[11] One claim that may arguably belong partially to the HOA alleges violation of the declarant's duty to provide documentation to the HOA after the period of declarant control of the condominium terminates. *See* RCW 64.34.312(1)(j).

requirements in multiple separate provisions of several different sales documents, and because of the fact that the purchasers were provided the statutory right of review for seven days and could cancel the PSA if they did not agree to binding arbitration under the terms spelled out in the POS, any argument that the arbitration agreement is somehow unconscionable must fail. *See* RCW 64.34.420(1) ("the purchaser, before conveyance, shall have the right to cancel the contract within seven days after first receiving the public offering statement . . . .").

b. The CPA, implied warranty of habitability, and duty to disclose latent construction defects claims must be resolved by binding arbitration.

This Court has decided that under a similar arbitration agreement, all contractual and common law claims brought by homeowners are subject to arbitration, pursuant to the terms of the Limited Warranty agreement, without regard to the issue of FAA preemption. *Satomi*, 159 P.3d at 464. The contract warranties are arbitrable to the extent they exceed the protections required by RCW 64.34.445. *Satomi*, 159 P.3d at 467.

Here, as in *Satomi*, the HOA has brought contractual, common law, and statutory claims stemming from their members' purchase of condominium units and an undivided share of the common elements. Consequently, it was reversible error for the trial court to deny Leschi Corp.'s motion to enforce the arbitration agreement

and fail to require, *at the very least*, binding arbitration of the contractual and common law claims brought by the HOA.

c. Judicial economy dictates all remaining claims be resolved by binding arbitration.

Courts interpret arbitration provisions broadly to allow arbitration of all controversies implicated by the language:

> The [arbitration] proceeding is in a forum selected by the parties in lieu of a court of justice. The object is to Avoid, what some feel to be, the formalities, the delay, the expense and vexation of ordinary litigation. It depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute.

Thorgaard Plumbing & Heating Co. v. King Cty., 71 Wn.2d 126, 132–33, 426 P.2d 828 (1967) (internal citation omitted).

In a case arising out of construction of a home, the court concluded not only that claims of fraudulent inducement, breach of contract, conversion, and slander of title were arbitrable where the arbitration agreement provided that "all claims, disputes, and controversies" between the parties arising from or related to the property must be submitted to arbitration, but also that even claims of assault, battery, and false imprisonment were arbitrable when a physical altercation arose during a dispute where the builder refused to repair the home's foundation. *Precision Homes of Indiana, Inc. v. Pickford*, 844 N.E.2d 126, 133 (Ind. App., 2006).

There is no basis for concluding that the Washington Legislature intended to encourage or permit piecemeal adjudication of interests

in condominium defect litigation when it approved the WCA provisions allowing judicial resolution of disputes. Here, where the HOA's claims all arise from and are related to alleged defects in the conversion of apartments to condominium units, and several of those claims are unequivocally subject to resolution by binding arbitration, regardless of FAA preemption, judicial economy clearly dictates that the HOA's claims should all be resolved by binding arbitration in a single proceeding. As the dissent in *Satomi* noted, "It would clearly promote judicial economy to resolve these claims, which arise from identical facts, in one arbitration hearing." *Satomi*, 159 P.3d at 469 (dissent).

3. The FAA Preempts the WCA Provision for Judicial Enforcement of Statutory Condominium Warranties As the PSA Involves Interstate Commerce

This Court has held that "the statutory right to trial applies to the [WCA] statutory warranties unless the statute is preempted by the FAA." *Satomi,* 159 P.3d at 467. In *Satomi*, this Court held that the purchase and sale agreement for purchase of condominium units did not involve interstate commerce, and thus did not invoke the FAA, because "the transaction represented by the contracts here was a garden variety Washington real estate deal. It involved a Washington company and Washington residents." *Satomi*, 159

P.3d at 467.[12] In *Satomi*, there was no evidence that federal regulation, interstate media or out-of-state contractors, purchasers, investors, financing or warranty administration were involved. *Id.*

Unlike *Satomi*, here Leschi Corp. has presented substantial evidence that the sales transactions at The Pier were anything but a "garden variety Washington real estate deal." The sales were a complex series of transactions involving not only incorporation of out-of-state materials but also out-of-state subcontractors involved in the conversion; installation of specified out-of-state appliances, fixtures, and finishing products; out-of-state residents purchasing Washington real property; out-of-state investment in Washington real estate; out-of-state financial institutions providing mortgage financing; financial transactions involving multiple interstate fund transfers; and interstate land lease guarantee and warranty administration.

A party alleging breach of rights or obligations available under the WCA is generally allowed to select judicial procedures to enforce its warranty claims. RCW 64.34.100(2).[13] A party's selection of non-binding arbitration under RCW 64.55.100 is

[12] Satomi, LLC has filed a Petition for Review appealing the portion of *Satomi* which held the FAA does not preempt the WCA provision for judicial enforcement of statutory condominium warranties. *See* Appendix 4.

[13] "Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. . . . " RCW 64.34.100(2).

considered a judicial procedure.[14] However, the FAA expressly provides that a controversy arising out of a contract "evidencing a transaction involving commerce" shall be settled by arbitration. 9 U.S.C. § 2. FAA section 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

State laws applicable only to arbitration agreements that would invalidate such agreements are preempted by the FAA; however, only "general contract defenses, such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166 (W.D. Wash., 2002). Where the FAA applies, it prohibits singling out arbitration provisions for suspect status under state law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Here, there is no evidence that the PSA itself is subject to a general contract defense.

In passing the FAA, Congress declared a "national policy favoring arbitration" and preempted "the power of the states to

[14] "The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter." RCW 64.34.100(2).

require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). The substantive law of arbitrability created by the FAA is applicable in both federal and state courts when an arbitration agreement has been executed and where interstate commerce is involved. *Id.*

The U.S. Supreme Court has repeatedly held that state law, "mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA." *See generally, Uniform Arbitration Act, Prefatory Note (2000), at CP 82-86.* No state may:

> decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *see Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Moses H. Cone*, 460 U.S. at 24–25, 103 S. Ct. 927 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .").

In *Allied-Bruce*, a homeowner sued the companies with whom

he had contracted for termite protection, but an Alabama statute disallowed predispute arbitration agreements. *Id.* at 269–70, 115 S. Ct. 834. Allied-Bruce operated in multiple states and the termite-treating and house-repairing material used by Allied-Bruce to carry out the terms of the contract came from outside Alabama. *Id.* at 282, 115 S. Ct. 834. The Supreme Court concluded the term "involving" commerce is broad and the functional equivalent of "affecting" commerce. *Id.* at 273–74, 115 S. Ct. 834. The FAA's reach coincides with that of the Commerce Clause, applying both to interstate shipment of goods and to contracts relating to interstate commerce. U.S. Const., art. I, § 8, cl. 3; *Allied-Bruce*, 513 U.S. at 274, 115 S. Ct. 834. The Supreme Court concluded the multistate nature of the agreement for services sufficiently implicated interstate commerce to preempt contrary state law and to require arbitration of virtually every commercial contract. *Id.* at 282, 115 S. Ct. 834. The Court held that the transaction evidenced by the contract need only "in fact" involve interstate commerce, meaning the FAA applied to preempt the state statute. *Id.* at 279–80, 115 S. Ct. 834. Similarly, here the PSA "in fact" involves interstate commerce, as four transactions involved interstate sales of real property in Washington.

Federal courts have long regarded virtually any activity related to building and construction as one "affecting" interstate commerce. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 783–84, 95 S.

Ct. 2004, 44 L. Ed. 2d 572 (1975) (title search inseparable from interstate aspects of real estate transactions); *N.L.R.B. v. Int'l Union of Operating Engr's, Local 571*, 317 F.2d 638, 642–43 (8th Cir., 1963) (building and construction industry is industry affecting commerce); *U.S. v. Patterson*, 792 F.2d 531, 534–35 (5th Cir.), *cert. den'd*, 479 U.S. 865 (1986) (construction work for business purposes likely to have an effect on interstate commerce through flow of people, money and materials across state lines). Here, as in *Patterson*, the construction and subsequent sale of the converted condominiums had an effect on interstate commerce through the flow of people, money and materials across state lines.

Arbitration agreements in insured home warranties are governed by and enforceable pursuant to the FAA where the warranty is sold in interstate commerce, the parties are from different states, or the home was located in a state other than the domiciliary state of the warranty company. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 984 (5th Cir., 1995); *Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 191–92 (4th Cir., 1991). Similarly, here the Limited Warranty is administered in interstate commerce, the purchasers are from different states, and the condominium is located in a state other than that of PWC, the warranty company.

In a case quite similar to the instant one, *Basura v. U.S. Home Corp.*, 98 Cal. App. 4th 1205, 120 Cal. Rptr. 2d 328, *rev. den'd*

(2002), the California Court of Appeals held the FAA preempted the California statute which permitted court actions in construction defect cases, even where the parties have agreed to arbitrate and required arbitration, on grounds that the purchase agreement involved interstate commerce. *Id.* at 1214-15, 120 Cal. Rptr. 2d 328. The subdivision developer utilized out-of-state contractors, engaged in nationwide marketing and advertising using interstate media, and used building materials and equipment manufactured and shipped from multiple states. *Id.* at 1214, 120 Cal. Rptr. 2d 328. Just as in *Basura*, Leschi Corp. used out-of-state contractors and installed building materials and appliances manufactured and shipped from multiple states.[15]

The court found an agreement to purchase a single family residence was a contract which evidenced a transaction involving commerce within the meaning of the FAA in *Hedges v. Carrigan*, 117 Cal. App. 4th 578, 586, 11 Cal. Rptr. 3d 787 (2004), because the anticipated financing involved the use of a Federal Housing Administration home loan, subject to HUD jurisdiction. The copyrighted loan forms used by the parties and their brokers could only be utilized by National Association of Realtors members, thereby implicating interstate commerce. *Id.* Similarly, while there

[15] Identically to the developer in *Basura*, Leschi Corp. also provided the homeowners with GE Appliances, Progress Lighting, and Delta plumbing, all manufactured in states outside Washington and shipped to the job site in Seattle. *See* 98 Cal. App. 4th at 1214, 120 Cal. Rptr. 2d 328.

is no direct evidence that an FHA loan was used by purchasers at The Pier, it is apparent that their financing was subject to significant federal regulation, thereby implicating interstate commerce.

In a California construction defect case, the court held that defendants' evidence of interstate commerce was sufficient to preempt contrary state law and compel contractual arbitration. *Shepard v. Edward Mackay Enterprises, Inc.*, 148 Cal. App. 4th 1092, 1101, 56 Cal. Rptr. 3d 326 (2007). Evidence of interstate commerce consisted of: (1) a declaration from the flooring supplier stating items it supplied were manufactured outside California and delivered across state lines; (2) a declaration from the door supplier stating that hardware and doors were manufactured in Mexico; (3) a declaration from a supplier stating the trusses were made from Washington lumber; (4) a declaration from the door and window supplier stating the doors and windows were manufactured outside California; and (5) a letter from the kitchen appliance supplier stating those products were produced outside the state. *Id.* at 1100. Similarly, Leschi Corp. has produced declarations providing evidence that the appliances, fixtures, and building materials used in The Pier conversion project were manufactured out-of-state.

Moreover, although the plaintiff in *Shepard* argued defendants' evidence was inadequate because none of the materials from out of state was at issue in this case, with the exception of the carpeting, the court stated it was unaware of any cases indicating

the FAA preempts contrary state law only if the particular dispute is over interstate goods. *Id.* at 1101. On the contrary, FAA section 2 indicates the pertinent question is whether the contract evidences a transaction involving interstate commerce, not whether the dispute arises from the particular part of the transaction involving interstate commerce. *Id.* Here, there is actual evidence that the elastomeric coating and siding materials supplied by out-of-state manufacturers are at issue in this case. Even if the problems with those items are found to be inherent in the product, however, the holding in *Shepard* supports looking only at the state of origination of the materials installed in the condominium project, not whether the claims implicate the out-of-state materials.

The Alabama Supreme Court listed five factors to be considered to decide whether a transaction has a substantial effect on interstate commerce: (1) the citizenship of the parties and any affiliation the parties have with out-of-state entitles; (2) tools and equipment used in performance of the contract; (3) allocation of the contract price to cost of services and materials involved in performance of the contract; (4) subsequent movement of the object of the contract across state lines; and (5) the degree to which the contract at issue was separable from other contract that are subject to the FAA. *AmSouth Bank v. Dees*, 847 So.2d 923, 936 (Ala., 2002). The court held that the totality of the actions of the mortgagor and the mortgagee demonstrated there was

movement of money across state lines and that the parties used instruments of interstate commerce, such as telephone lines, to move such money and thus the transaction involved interstate commerce. *Id.* at 938. Similarly, the totality of the actions of the purchasers and Leschi Corp. demonstrated movement of money across state lines, both for the out-of-state purchasers and the out-of-state lenders. The parties certainly used interstate commerce, such as faxes and mail, to transfer contract documents, and it is reasonable to assume one or more fund transfers were made across state lines.

In an action by homeowners against homebuilders, the homeowners warranty contract requiring FAA arbitration was enforced where the warranty administrator was an out-of-state corporation and any warranty complaints had to be sent to its out-of-state home office. *Langfitt v. Jackson*, 284 Ga. App. 628, 644 S.E.2d 460, 466-67 (2007). Similarly, the warranty administrator is a Virginia corporation that requires warranty complaints be sent to its Virginia office for processing and resolution.

In a case where a contractor sued an architect for breach of contract and negligence, defendant's right to compel contractual arbitration under the FAA was ultimately upheld because defendant was an out-of-state corporation, and twenty-nine suppliers to the project, as well as the materials they supplied, were from out-of-state. *McCarney v. Nearing, Staats, Prelogar and Jones*, 866

S.W.2d 881, 888 (Mo. App., W.D. 1993). Similarly, here four purchasers were out-of-state residents, and most manufacturers of materials installed in the project were also from out-of-state.

In a construction defect case where the FAA was held to apply, *Childers v. Advanced Foundation Repairs, L.P.*, 2007 WL 2019755 (Tex. App.-Corpus Christi, Jul. 12, 2007), the court evaluated several factors to determine that interstate commerce was involved: (1) location of headquarters in another state; (2) transportation of materials across state lines; (3) manufacture of parts in a different state; (4) billings prepared out of state; and (5) interstate mail and phone calls in support of a contract. *Id.* at *3 (citing *Stewart Title Guar. Co. v. Mack*, 945 S.W.2d 330, 333 (Tex. App.-Houston, 1997)). Similarly, the sales transactions here are evidence of interstate commerce: the warranty administrator is located in Virginia, numerous building materials necessarily crossed state lines for installation at the project, the appliances and fixtures were manufactured in other states, and interstate media supported the sales contract.

In a suit to compel arbitration, the court held that a contract containing the arbitration agreement involved interstate commerce and was thus covered by the FAA where an Oregon corporation, developed real estate and constructed cell-phone towers and had hired a professional employer organization, also an Oregon corporation, to manage its human resources issues. *Legacy*

Wireless Services, Inc. v. Human Capital, L.L.C., 314 F. Supp. 2d 1045, 1053 (D. Or. 2004). Interstate commerce was involved with the contract because federal laws were being administered and the Oregon services provider was aided in the performance of the contract by a Michigan services corporation. *Id.* Similarly, here multiple federal laws are implicated in the unit sales transactions, and Leschi Corp. was aided in the performance of the contract by PWC, a Virginia warranty administration corporation.

It is well established that the FAA controls over conflicting state law to require enforcement of an arbitration agreement when interstate commerce is involved. In *Allison v. Medicab Intern., Inc.*, 92 Wn.2d 199, 597 P.2d 380 (1979), the court held that the FAA controlled and preempted conflicting state law to require arbitration when the contract between the parties provided:

> Any controversy or dispute arising out of or in connection with this Agreement or its interpretation, performance or termination, which the parties are unable to resolve . . . may be submitted to arbitration by either party.

Id. at 200–01, 597 P.2d 380. Plaintiffs in that case contended that arbitration should not be enforced because the cause of action was based on violations of the Franchise Investment Protection Act, ch. 19.100 RCW, which gives jurisdiction to state courts. *Id.* at 201. The court disagreed, citing *Pinkis v. Network Cinema Corp.*, 9 Wn. App. 337, 512 P.2d 751 (Div. 1, 1973), where a similar arbitration clause in a franchise agreement had been upheld. *Allison*, 92

Wn.2d at 201, 597 P.2d 380.

In *Allison*, the contract involved a transaction between a New York corporation and a Washington resident, franchise payments made in New York, supplies purchased in New York for use in Washington, and performance of the contract involving considerable interstate travel by both parties. *Id.* at 202. The court adopted the majority rule in concluding the interstate commerce elements of the transaction implicated the FAA and therefore preempted the contrary state statute. *Id.*

Similar to *Allison*, here earnest money and unit sales payments were made across state lines between a Washington corporation and residents of Virginia and California; funding originated in California, Maryland, Michigan and New Jersey; appliances and fixtures were shipped from out-of-state manufacturing plants for use in Washington; and it may be reasonably assumed that some out-of-state purchasers traveled to Washington to either view their new property or live in it.

This Court has held that a party seeking FAA preemption of contrary state law must make a threshold showing that the contract involves interstate commerce. *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 358, 85 P.3d 389 (Div. 1, 2004). It was a sufficient showing of interstate commerce involvement when an employment contract required active employee participation in expansion of the business in the Northwest through growth of the

existing Washington business into new geographic markets. *Id.* at 358–59, 85 P.3d 389. Similar to *Walters*, here the PSA and incorporated specifications expressly required transfer into Washington of brand-name building products, appliances and fixtures that must have originated from out-of-state manufacturers.

Washington has a strong policy favoring arbitration of disputes. *Satomi*, 159 P.3d at 464 (citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 301 n. 2, 103 P.3d 753 (2004)). Any doubts about the scope of arbitrable issues are resolved in favor of arbitration "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* This Court has noted that Congress enacted the FAA as an expression of public policy favoring arbitration of disputes. *Satomi*, 159 P.3d at 464. The FAA's basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. *Id.* (citing *Allied-Bruce*, 513 U.S. at 270, 115 S. Ct. 834). Where it applies, the FAA preempts state law, prohibiting application of state statutes that invalidate arbitration agreements. *Id.* (citing *Allied-Bruce,* 513 U.S. at 272, 115 S. Ct. 834).

The U.S. Supreme Court considered the scope of FAA preemption of contrary state law in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003). In concluding debt restructuring arrangements between an Alabama bank and an Alabama construction company transactions were

governed by the FAA, the Supreme Court described the phrase "involving commerce" as the "functional equivalent of the more familiar term 'affecting commerce'–words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Satomi*, 159 P.3d at 465 (quoting *Citizens Bank,* 539 U.S. at 56, 123 S. Ct. 2037). The Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control. . . ." *Satomi*, 159 P.3d at 465 (quoting *Citizens Bank,* 539 U.S. at 56–57, 123 S. Ct. 2037) (internal quotes and citation omitted). "Only the general practice subject to federal control need have a substantial effect on interstate commerce." *Id.* (citing *Citizens Bank,* 539 U.S. at 57, 123 S. Ct. 2037) .

This Court noted that the *Citizens Bank* debt restructuring agreements, although executed in Alabama by Alabama residents, easily met the "involving commerce" test because (1) funds were used from loans, the subject of the debt restructuring agreements, to finance large projects throughout the southeastern United States; (2) the restructured debt was secured in part by an inventory of goods assembled from out-of-state parts and raw materials; and (3) the general practice represented by commercial lending, the transactions at issue, had a broad impact on the U.S. economy, and was clearly within Congress' regulatory power.

Satomi, 159 P.3d at 465 (citing *Citizens Bank,* 539 U.S. at 57–58, 123 S. Ct. 2037). *Citizens Bank* confirmed the broad reach of the FAA that the U.S. Supreme Court had earlier announced in *Allied-Bruce*. *Satomi*, 159 P.3d at 465. The *Citizens Bank* holding was perhaps best summarized as follows:

> Thus, even when a transaction is entered into between residents of the same state and consummated in that state, the transaction implicates the FAA when "in the aggregate the economic activity in question" represents a "general practice subject to federal control." The particular transaction at issue "taken alone," therefore, need not have "any specific effect" on interstate commerce to implicate the FAA.

Legacy Wireless, 314 F. Supp. 2d 1045, 1052 (quoting *Citizens Bank,* 539 U.S. 52, 123 S. Ct. at 2040) (internal citations omitted).

Here, the multiple financial transactions involving the purchase of the condominium units represent "a general practice subject to federal control" because residential home purchases are subject to such a wide variety of federal statutes and regulations. For example, RESPA, 12 U.S.C. §§ 2601–2617, requires residential financing institutions provide the homebuyer with a HUD Special Information Booklet, a good-faith estimate of settlement services, HUD-1 Settlement Statement, computer loan origination fee disclosure, initial and annual escrow account statements, and a servicing disclosure statement. Similarly, the PSA requires the purchasers be provided with a federal EPA booklet on lead-based

paint hazards.[16] Examples of applicable federal control that supersede state laws relating to home financing include the Depository Institution Deregulation Monetary Control Act ("DIDMCA"),[17] which removed usury caps on state interest ceilings for loans secured by first mortgages on homes and preempted state limitations on a lender's ability to assess "points" and finance charges; and the Alternative Mortgage Transaction Parity Act ("AMTPA"),[18] which removed the states' abilities to limit terms on "alternative" mortgages.

Because interstate commerce is so significantly involved in the express terms of the condominium sales transactions themselves, unlike *Satomi,* which only provided evidence of the materials used in construction, the FAA's preference for enforcement of binding arbitration agreements preempts judicial remedies otherwise available under the WCA.

The Washington version of the Revised Uniform Arbitration Act ("RUAA"), ch. 7.04A RCW, now governs all arbitration agreements, except where the amount in dispute is less than the mandatory

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[16] *See* ¶ k at CP 351, as required by 42 U.S.C. § 4852d(a)(1)(A).

[17] Pub. L. No. 960221, 94 Stat. 161 (1980), codified throughout Title 12 of the U.S. Code, supersedes contrary state regulations. *See, e.g.,* WAC 208-620-560(5) ("Unless otherwise preempted under the [DIDMCA], if a licensee makes a new loan or increases a credit line within one hundred twenty days after originating a previous loan or credit line to the same borrower, the origination fee on the new loan or increased credit line shall be limited . . . .).

[18] 1312 U.S.C. §§ 3801–3806. After July 1, 2003, the AMTPA implementing regulation did not preempt the Washington rule prohibiting prepayment penalties on loans made at rates authorized under the Consumer Loan Act. *See* Wash. Dep't of Fin. Instit., Interpretive Letter 03-01-CL (Dec. 5, 2003), in Appendix 5.

arbitration limit or the agreement is between employers and employees. *See* RCW 7.04A.030(2)–(4), 7.06.020(1). Because neither exception applies here, the RUAA requires binding arbitration according to the terms of the PSA and Limited Warranty, even though the agreements were entered into before January 1, 2006. RCW 7.04A.030(2), .060(1). The court decides whether a controversy is subject to an agreement to arbitrate, RCW 7.04A.060(2), and an agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract," RCW 7.04A.060(1).

The FAA preempts the WCA provision for judicial resolution of statutory WCA claims and requires enforcement of the binding arbitration provisions of the PSA and Limited Warranty for the remaining claims. Leschi Corp. presented substantial evidence to the trial court that the agreements involve interstate commerce.

The PSA is a contract that involves multiple transactions affecting interstate commerce. Two subcontractors are out-of-state entities; most of the fixtures and materials incorporated into the conversion were from out-of-state, a Connecticut company guarantees performance on the aquatic land lease, out-of-state residents purchased four units (14 percent), and out-of-state lenders financed the purchase of one-third of the units.

There can be no dispute that all the items manufactured by out-of-state entities were transported by interstate commerce and

installed at The Pier for purchase via the PSA transactions. Sales of condominium units are but one component of the larger "general subject" of relocation to Washington. It is reasonable to assume that the out-of-state purchases involved interstate commerce, because they must have used one or more modes of interstate communication, such as mail, fax, internet, e-mail, telephone or travel to arrange for and complete the transactions. Fax transmittal of the signed sales documents was specifically permitted by the PSA. *¶ m, at CP 352.* Clear evidence of such interstate fax transmittal is present in the sales document faxed from Virginia to Washington.[19] *CP 350.* The parties may also agree to e-mail transmission of the documents. *¶ m, at CP 352.* Two other unit sales were to out-of-state residents. *CP 369–71.*

Additionally, sales to out-of-state residents represent integral components of the "general subjects" of interstate travel and interstate property transfer. It is reasonable to assume most such purchasers will relocate from their out-of-state residences to The Pier, and at least travel to Washington using interstate transportation. Such travel necessitates interstate financial transactions to procure transportation, meals, lodging, and other incidentals. Furthermore, the sales transactions included purchase

[19] The PSA is marked as faxed from Area Code 703, which the Court may take judicial notice is located in Arlington County, Virginia. ER 201(d); *see* Appendix 7.

of "an undivided interest in the common and limited common elements, areas and facilities included in the Condominium Declaration." *¶ d, at CP 351.* Thus, each out-of-state purchaser bought into the common and limited common elements of the condominium, not just their individual units.

4. The Trial Court Decision Should Be Reversed As This Court Has Seriously Questioned Its Holding in *Marina Cove*

At the trial court level, the HOA's principal argument against FAA preemption of the WCA requirement for judicial enforcement was that this Court had already decided the issue in *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 244, 34 P.3d 870 (2001), where condominium construction and purchase and sale agreements between Washington companies and Washington residents were held not to involve interstate commerce or invoke FAA preemption of the WCA judicial remedy. *CP 451–55.* However, this Court has seriously questioned its own holding in *Marina Cove*. *Satomi,* 159 P.3d at 465–66.

In *Marina Cove*, this Court adopted an interpretation of *U.S. v. Lopez*, 514 U.S. 549, 559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995),[20] enunciated in *L & L Kempwood Assoc., L.P. v. Omega Builders*, 972 S.W.2d 819, 822 (Tex. App.-Corpus Christi, 1998).

[20] *Lopez* described the test of Congress' power to regulate under the Commerce Clause as whether the activity to be regulated "substantially affects" interstate commerce; this language "resulted in *Marina Cove*, which came between *Lopez* and *Allied-Bruce* in 1995, and *Citizens Bank* in 2003." *Satomi*, 159 P.3d at 466.

The Texas Supreme Court later reversed *L & L Kempwood*, using the same rationale applied in *Citizens Bank*. *Satomi*, 159 P.3d at 465. In *Citizens Bank*, the Court rejected the "substantially affecting" interpretation as an "improperly cramped view" of the Commerce Clause power, and held instead that a significant effect on interstate commerce need only be found in the general practice subject to federal control. *Id.* at 466. Given the application in *Marina Cove* of the discredited "substantially affecting" test, "*Marina Cove's* continuing validity is questionable." *Id.*

Because the HOA's main argument before the trial court for not enforcing the arbitration agreement was based almost entirely on *Marina Cove*, and this Court has seriously questioned its holding in that case, the trial court's decision should be reversed.

5. Trial Court Proceedings Should Be Stayed Pending Binding Arbitration

Once a party files a motion to enforce arbitration, the court must stay any judicial proceeding that involves claims alleged to be subject to the arbitration until the court renders a final decision on arbitration. RCW 7.04A.070(5). If the court ultimately orders arbitration, judicial proceedings are stayed. RCW 7.04A.070(6).

If either party attempts to initiate an action contrary to the arbitration agreement, the other party may move to have the action stayed and the court in which the action is pending "Shall * * * stay the Action * * * until an Arbitration has been had in accordance with

the agreement." *Thorgaard*, 71 Wn.2d at 132, 426 P.2d 828 (quoting RCW 7.04.030); *see Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (Div. 1, 1980) ("Ordinarily, if one party initiates court action in spite of an arbitration clause, the other party is entitled to an order staying the litigation."). Similarly, the FAA provides for a stay of judicial proceedings pending arbitration when the proceedings involve issues subject to an arbitration agreement. 9 U.S.C. § 3; *Luna*, 236 F. Supp. 2d 1166, 1173.

Once the court determines the FAA governs resolution of the dispute, the statute "leaves no place for the exercise of discretion" by a court, but instead mandates that the parties be directed "to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (citing 9 U.S.C. §§ 3–4). To stay legal action, a court must find the contractual arbitration clauses valid and the dispute referable to arbitration under the contract. *See Greenlee v. AAACON Auto Transport, Inc.*, 6 Wn. App. 742, 743–44, 496 P.2d 359 (1972). Here, the PSA, Limited Warranty, POS, and Declaration contain valid arbitration clauses that clearly refer all of the HOA's claims to binding arbitration. Trial court proceedings should therefore be stayed pending resolution of the arbitration proceedings.

6. Leschi Corp. Should Be Awarded Its Reasonable Attorney Fees and Costs for Bringing This Appeal

The appellate court is authorized to award statutory attorney fees and reasonable expenses actually incurred and reasonably necessary for review to the substantially prevailing party on review. RAP 14.3. Attorney fees are awarded on appeal, if allowed by applicable law, e.g., by statute, contract, or a recognized ground of equity. RAP 18.1(a); *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); *Eugster v. City of Spokane*, 121 Wn. App. 799, 817, 91 P.3d 117 (2004) ("RAP 14.2 provides that costs will be awarded to the prevailing party on appeal, and RAP 18.1 allows for the recovery of reasonable attorney fees if applicable law grants the right to such recovery.").

A contractual provision supporting an award of attorney fees at trial also supports an award of attorney fees on appeal. *Jacob's Meadow Owners Ass'n v. Plateau 44 II*, LLC, --- P.3d ----, 2007 WL 2083579, at *12 (Wash. App. Div. 1, 2007).

In *Floor Express, Inc. v. Daly*, 158 P.3d 619, 623 (Wash. App., 2007), the contracts between the parties provided that in "any suit or other action arising out of this proposal, the prevailing party shall recover from the other party, in addition to all court costs and disbursements, reasonable attorney's fees." The court held the prevailing party on appeal of the trial court's dismissal of its counterclaim was entitled to recover from the non-prevailing party

the attorney fees incurred in bringing the appeal, pursuant to RAP 18.1(d). *Floor Express*, 158 P.3d at 623. Similarly, the PSA contains an express contractual provision regarding award of attorney fees and expenses:

> Attorneys' Fees. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

¶ q, at CP 353. If Leschi Corp. prevails on appeal, it should be awarded its reasonable attorney fees, costs and expenses in bringing this appeal, pursuant to the contract.

V. CONCLUSION

Based on the foregoing, Leschi Corp. respectfully requests this Court reverse the Superior Court's order denying Leschi Corp.'s motion to enforce binding arbitration, and remand with instructions to resolve the HOA's claims by binding arbitration conducted pursuant to the arbitration agreement. Leschi Corp. also requests stay of further litigation, including arbitration under RCW 64.55, and its reasonable attorney fees and costs for bringing this appeal.

Respectfully submitted this 31st day of July, 2007.

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A. APPENDIX

1. Uniform Arbitration Act.

RCW 7.04A.030. When chapter applies.

(1) Before July 1, 2006, this chapter governs agreements to arbitrate entered into:

(a) On or after January 1, 2006; and

(b) Before January 1, 2006, if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this chapter.

(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.

(3) This chapter does not apply to any arbitration governed by chapter 7.06 RCW.

(4) This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.

[2005 c 433 § 3.]

RCW 7.04A.060. Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition

precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[2005 c 433 § 6.]

RCW 7.04A.070. Motion to compel or stay arbitration.

(1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(3) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(4) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be filed in that court. Otherwise a motion under this section may be filed in any court as required by RCW 7.04A.270.

(5) If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(6) If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim.

[2005 c 433 § 7.]

2. Washington Condominium Act, chapter 64.34 RCW. [pertinent sections]

RCW 64.34.005. Findings — Intent — 2004 c 201.

(1) The legislature finds, declares, and determines that:

(a) Washington's cities and counties under the growth management act are required to encourage urban growth in urban growth areas at densities that accommodate twenty-year growth projections;

(b) The growth management act's planning goals include encouraging the availability of affordable housing for all residents of the state and promoting a variety of housing types;

(c) Quality condominium construction needs to be encouraged to achieve growth management act mandated urban densities and to ensure that residents of the state, particularly in urban growth areas, have a broad range of ownership choices.

(2) It is the intent of the legislature that limited changes be made to the condominium act to ensure that a broad range of affordable homeownership opportunities continue to be available to the residents of the state, and to assist cities' and counties' efforts to achieve the density mandates of the growth management act.

[2004 c 201 § 1.]

RCW 64.34.010. Applicability.

(1) This chapter applies to all condominiums created within this state after July 1, 1990. RCW 64.34.040 (separate titles and taxation), RCW 64.34.050 (applicability of local ordinances, regulations, and building codes), RCW 64.34.060 (condemnation), RCW 64.34.208 (construction and validity of declaration and bylaws), RCW 64.34.212 (description of units), RCW 64.34.304(1) (a) through (f) and (k) through (r) (powers of unit owners' association), RCW 64.34.308(1) (board of directors and officers), RCW 64.34.340 (voting—proxies), RCW 64.34.344 (tort and contract liability), RCW 64.34.354 (notification on sale of unit), RCW 64.34.360(3) (common expenses—assessments), RCW 64.34.364 (lien for assessments), RCW 64.34.372 (association records), RCW 64.34.425 (resales of units), RCW 64.34.455 (effect of violation on rights of action; attorney's fees), and RCW 64.34.020 (definitions) to the extent necessary in construing any of those sections, apply to all condominiums created in this state before July 1, 1990; but those sections apply only with respect to events and circumstances occurring after July 1, 1990, and do not invalidate or supersede existing, inconsistent provisions of the declaration, bylaws, or survey maps or plans of those condominiums.

(2) The provisions of chapter 64.32 RCW do not apply to condominiums created after July 1, 1990, and do not invalidate any amendment to the declaration, bylaws, and survey maps and plans of any condominium created before July 1, 1990, if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by chapter 64.32 RCW. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter which are not otherwise provided for in the declaration or chapter 64.32 RCW, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(3) This chapter does not apply to condominiums or units located outside this state.

(4) RCW 64.34.400 (applicability—waiver), RCW 64.34.405 (liability for public offering statement requirements), RCW 64.34.410 (public offering statement—general provisions), RCW 64.34.415 (public offering statement—conversion condominiums),

RCW 64.34.420 (purchaser's right to cancel), RCW 64.34.430 (escrow of deposits), RCW 64.34.440 (conversion condominiums—notice—tenants), and RCW 64.34.455 (effect of violations on rights of action—attorney's fees) apply with respect to all sales of units pursuant to purchase agreements entered into after July 1, 1990, in condominiums created before July 1, 1990, in which as of July 1, 1990, the declarant or an affiliate of the declarant owns or had the right to create at least ten units constituting at least twenty percent of the units in the condominium.

[1993 c 429 § 12; 1992 c 220 § 1; 1989 c 43 § 1-102.]

RCW 64.34.020. Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context requires otherwise, and in this chapter:

(1) "Affiliate" means any person who controls, is controlled by, or is under common control with the referenced person. A person "controls" another person if the person: (a) Is a general partner, officer, director, or employer of the referenced person; (b) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the referenced person; (c) controls in any manner the election of a majority of the directors of the referenced person; or (d) has contributed more than twenty percent of the capital of the referenced person. A person "is controlled by" another person if the other person: (i) Is a general partner, officer, director, or employer of the person; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person; (iii) controls in any manner the election of a majority of the directors of the person; or (iv) has contributed more than twenty percent of the capital of the person. Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.

(3) "Assessment" means all sums chargeable by the association against a unit including, without limitation: (a) Regular and special assessments for common expenses, charges, and fines imposed by the association; (b) interest and late charges on any delinquent account; and (c) costs of collection, including reasonable attorneys' fees, incurred by the association in connection with the collection of a delinquent owner's account.

(4) "Association" or "unit owners' association" means the unit owners' association organized under RCW 64.34.300.

(5) "Board of directors" means the body, regardless of name, with primary authority to manage the affairs of the association.

(6) "Common elements" means all portions of a condominium other than the units.

(7) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(8) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to RCW 64.34.224.

(9) "Condominium" means real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the unit owners, and unless a declaration and a survey map and plans have been recorded pursuant to this chapter.

(10) "Conversion condominium" means a condominium (a) that at any time before creation of the condominium was lawfully occupied wholly or partially by a tenant or subtenant for residential purposes pursuant to a rental agreement, oral or written, express or implied, for which the tenant or subtenant had not received the notice described in (b) of this subsection; or (b) that, at any time within twelve months before the conveyance of, or acceptance of an agreement to convey, any unit therein other than to a declarant or any affiliate of a declarant, was lawfully occupied wholly or

partially by a residential tenant of a declarant or an affiliate of a declarant and such tenant was not notified in writing, prior to lawfully occupying a unit or executing a rental agreement, whichever event first occurs, that the unit was part of a condominium and subject to sale. "Conversion condominium" shall not include a condominium in which, before July 1, 1990, any unit therein had been conveyed or been made subject to an agreement to convey to any transferee other than a declarant or an affiliate of a declarant.

(11) "Conveyance" means any transfer of the ownership of a unit, including a transfer by deed or by real estate contract and, with respect to a unit in a leasehold condominium, a transfer by lease or assignment thereof, but shall not include a transfer solely for security.

(12) "Dealer" means a person who, together with such person's affiliates, owns or has a right to acquire either six or more units in a condominium or fifty percent or more of the units in a condominium containing more than two units.

(13) "Declarant" means:

(a) Any person who executes as declarant a declaration as defined in subsection (15) of this section; or

(b) Any person who reserves any special declarant right in the declaration; or

(c) Any person who exercises special declarant rights or to whom special declarant rights are transferred; or

(d) Any person who is the owner of a fee interest in the real property which is subjected to the declaration at the time of the recording of an instrument pursuant to RCW 64.34.316 and who directly or through one or more affiliates is materially involved in the construction, marketing, or sale of units in the condominium created by the recording of the instrument.

(14) "Declarant control" means the right of the declarant or persons designated by the declarant to appoint and remove officers and members of the board of directors, or to veto or approve a proposed action of the board or association, pursuant to RCW 64.34.308 (4) or (5).

(15) "Declaration" means the document, however denominated, that creates a condominium by setting forth the information required by RCW 64.34.216 and any amendments to that document.

(16) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (a) Add real property or improvements to a condominium; (b) create units, common elements, or limited common elements within real property included or added to a condominium; (c) subdivide units or convert units into common elements; (d) withdraw real property from a condominium; or (e) reallocate limited common elements with respect to units that have not been conveyed by the declarant.

(17) "Dispose" or "disposition" means a voluntary transfer or conveyance to a purchaser or lessee of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(18) "Eligible mortgagee" means the holder of a mortgage on a unit that has filed with the secretary of the association a written request that it be given copies of notices of any action by the association that requires the consent of mortgagees.

(19) "Foreclosure" means a forfeiture or judicial or nonjudicial foreclosure of a mortgage or a deed in lieu thereof.

(20) "Identifying number" means the designation of each unit in a condominium.

(21) "Leasehold condominium" means a condominium in which all or a portion of the real property is subject to a lease, the expiration or termination of which will terminate the condominium or reduce its size.

(22) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204 (2) or (4) for the exclusive use of one or more but fewer than all of the units.

(23) "Master association" means an organization described in RCW 64.34.276, whether or not it is also an association

described in RCW 64.34.300.

(24) "Mortgage" means a mortgage, deed of trust or real estate contract.

(25) "Person" means a natural person, corporation, partnership, limited partnership, trust, governmental subdivision or agency, or other legal entity.

(26) "Purchaser" means any person, other than a declarant or a dealer, who by means of a disposition acquires a legal or equitable interest in a unit other than (a) a leasehold interest, including renewal options, of less than twenty years at the time of creation of the unit, or (b) as security for an obligation.

(27) "Real property" means any fee, leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements thereon and easements, rights and interests appurtenant thereto which by custom, usage, or law pass with a conveyance of land although not described in the contract of sale or instrument of conveyance. "Real property" includes parcels, with or without upper or lower boundaries, and spaces that may be filled with air or water.

(28) "Residential purposes" means use for dwelling or recreational purposes, or both.

(29) "Special declarant rights" means rights reserved for the benefit of a declarant to: (a) Complete improvements indicated on survey maps and plans filed with the declaration under RCW 64.34.232; (b) exercise any development right under RCW 64.34.236; (c) maintain sales offices, management offices, signs advertising the condominium, and models under RCW 64.34.256; (d) use easements through the common elements for the purpose of making improvements within the condominium or within real property which may be added to the condominium under RCW 64.34.260; (e) make the condominium part of a larger condominium or a development under RCW 64.34.280; (f) make the condominium subject to a master association under RCW 64.34.276; or (g) appoint or remove any officer of the association or any master association or any member of the board of directors, or to veto or approve a proposed action of the board or association,

during any period of declarant control under RCW 64.34.308(4).

(30) "Timeshare" shall have the meaning specified in the timeshare act, RCW 64.36.010(11).

(31) "Unit" means a physical portion of the condominium designated for separate ownership, the boundaries of which are described pursuant to RCW 64.34.216(1) (d). "Separate ownership" includes leasing a unit in a leasehold condominium under a lease that expires contemporaneously with any lease, the expiration or termination of which will remove the unit from the condominium.

(32) "Unit owner" means a declarant or other person who owns a unit or leases a unit in a leasehold condominium under a lease that expires simultaneously with any lease, the expiration or termination of which will remove the unit from the condominium, but does not include a person who has an interest in a unit solely as security for an obligation. "Unit owner" means the vendee, not the vendor, of a unit under a real estate contract.

[2004 c 201 § 9; 1992 c 220 § 2; 1990 c 166 § 1; 1989 c 43 § 1-103.]

RCW 64.34.070. Law applicable — General principles.

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, condemnation, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

[1989 c 43 § 1-108.]

RCW 64.34.073. Application of chapter 64.55 RCW.

Chapter 64.55 RCW includes requirements for: The inspection of the building enclosures of multiunit residential buildings, as defined in RCW 64.55.010, which includes

condominiums and conversion condominiums; for provision of inspection and repair reports; and for the resolution of implied or express warranty disputes under chapter 64.34 RCW.

[2005 c 456 § 21.]

RCW 64.34.090. Obligation of good faith.

Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

[1989 c 43 § 1-112.]

RCW 64.34.100. Remedies liberally administered.

(1) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(2) Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

[2005 c 456 § 20; 2004 c 201 § 2; 1989 c 43 § 1-113.]

RCW 64.34.200. Creation of condominium.

(1) A condominium may be created pursuant to this chapter only by recording a declaration executed by the owner of the interest subject to this chapter in the same manner as a deed and by simultaneously recording a survey map and plans pursuant to RCW 64.34.232. The declaration and survey map and plans must be recorded in every county in which any portion of the condominium is located, and the condominium shall not have the same name as any other existing condominium, whether created under this chapter or under chapter 64.32 RCW, in any county in which the condominium is located.

(2) A declaration or an amendment to a declaration adding units to a condominium may not be recorded unless (a) all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed as evidenced by a recorded certificate of completion executed by the declarant which certificate may be included in the declaration or the amendment, the survey map and plans to be recorded pursuant to RCW 64.34.232, or a separately recorded written instrument, and (b) all horizontal and vertical boundaries of such units are substantially completed in accordance with the plans required to be recorded by RCW 64.34.232, as evidenced by a recorded certificate of completion executed by a licensed surveyor.

[1992 c 220 § 4; 1990 c 166 § 2; 1989 c 43 § 2-101.]

RCW 64.34.216. Contents of declaration.

(1) The declaration for a condominium must contain:

(a) The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium," and the name of the association;

(b) A legal description of the real property included in the condominium;

(c) A statement of the number of units which the declarant has created and, if the declarant has reserved the right to create additional units, the number of such additional units;

(d) The identifying number of each unit created by the declaration and a description of the boundaries of each unit if and to the extent they are different from the boundaries stated in RCW 64.34.204(1);

(e) With respect to each existing unit:

(i) The approximate square footage;

(ii) The number of bathrooms, whole or partial;

(iii) The number of rooms designated primarily as bedrooms;

(iv) The number of built-in fireplaces; and

(v) The level or levels on which each unit is located.

The data described in (ii), (iii), and (iv) of this subsection (1)(e) may be omitted with respect to units restricted to nonresidential use;

(f) The number of parking spaces and whether covered, uncovered, or enclosed;

(g) The number of moorage slips, if any;

(h) A description of any limited common elements, other than those specified in RCW 64.34.204 (2) and (4), as provided in RCW 64.34.232(2) (j);

(i) A description of any real property which may be allocated subsequently by the declarant as limited common elements, other than limited common elements specified in RCW 64.34.204 (2) and (4), together with a statement that they may be so allocated;

(j) A description of any development rights and other special declarant rights under RCW 64.34.020(29) reserved by the declarant, together with a description of the real property to which the development rights apply, and a time limit within which each of those rights must be exercised;

(k) If any development right may be exercised with respect to different parcels of real property at different times, a statement to that effect together with: (i) Either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards; and (ii) a statement as to whether, if any development right is exercised in any portion of the real property subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real property;

(l) Any other conditions or limitations under which the rights described in (j) of this subsection may be exercised or will lapse;

(m) An allocation to each unit of the allocated interests in the manner described in RCW 64.34.224;

(n) Any restrictions in the declaration on use, occupancy, or alienation of the units;

(o) A cross-reference by recording number to the survey map and plans for the units created by the declaration; and

(p) All matters required or permitted by RCW 64.34.220 through 64.34.232, 64.34.256, 64.34.260, 64.34.276, and 64.34.308(4).

(2) All amendments to the declaration shall contain a cross-reference by recording number to the declaration and to any prior amendments thereto. All amendments to the declaration adding units shall contain a cross-reference by recording number to the survey map and plans relating to the added units and set forth all information required by RCW 64.34.216(1) with respect to the

added units.

(3) The declaration may contain any other matters the declarant deems appropriate.

[1992 c 220 § 7; 1989 c 43 § 2-105.]

RCW 64.34.300. Unit owners' association — Organization.

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners. Following termination of the condominium, the membership of the association shall consist of all of the unit owners at the time of termination entitled to distributions of proceeds under RCW 64.34.268 or their heirs, successors, or assigns. The association shall be organized as a profit or nonprofit corporation. In case of any conflict between Title 23B RCW, the business corporation act, chapter 24.03 RCW, the nonprofit corporation act, or chapter 24.06 RCW, the nonprofit miscellaneous and mutual corporations act, and this chapter, this chapter shall control.

[1992 c 220 § 14; 1989 c 43 § 3-101.]

RCW 64.34.304. Unit owners' association — Powers.

(1) Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may:

(a) Adopt and amend bylaws, rules, and regulations;

(b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners;

(c) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;

(d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(e) Make contracts and incur liabilities;

(f) Regulate the use, maintenance, repair, replacement, and modification of common elements;

(g) Cause additional improvements to be made as a part of the common elements;

(h) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to RCW 64.34.348;

(i) Grant easements, leases, licenses, and concessions through or over the common elements and petition for or consent to the vacation of streets and alleys;

(j) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in RCW 64.34.204 (2) and (4), and for services provided to unit owners;

(k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association;

(l) Impose and collect reasonable charges for the preparation and recording of amendments to the declaration, resale certificates required by RCW 64.34.425, and statements of unpaid assessments;

(m) Provide for the indemnification of its officers and board of directors and maintain directors' and officers' liability insurance;

(n) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration provides;

(o) Join in a petition for the establishment of a parking and business improvement area, participate in the rate payers' board or other advisory body set up by the legislative authority for operation of a parking and business improvement area, and pay special assessments levied by the legislative authority on a parking and business improvement area encompassing the condominium property for activities and projects which benefit the condominium

directly or indirectly;

(p) Exercise any other powers conferred by the declaration or bylaws;

(q) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(r) Exercise any other powers necessary and proper for the governance and operation of the association.

(2) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

[1993 c 429 § 11; 1990 c 166 § 3; 1989 c 43 § 3-102.]

RCW 64.34.312. Control of association — Transfer.

(1) Within sixty days after the termination of the period of declarant control provided in RCW 64.34.308(4) or, in the absence of such period, within sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association all property of the unit owners and of the association held or controlled by the declarant including, but not limited to:

(a) The original or a photocopy of the recorded declaration and each amendment to the declaration;

(b) The certificate of incorporation and a copy or duplicate original of the articles of incorporation of the association as filed with the secretary of state;

(c) The bylaws of the association;

(d) The minute books, including all minutes, and other books and records of the association;

(e) Any rules and regulations that have been adopted;

(f) Resignations of officers and members of the board who are required to resign because the declarant is required to relinquish control of the association;

(g) The financial records, including canceled checks, bank statements, and financial statements of the association, and source documents from the time of incorporation of the association through the date of transfer of control to the unit owners;

(h) Association funds or the control of the funds of the

association;

(i) All tangible personal property of the association, represented by the declarant to be the property of the association or ostensibly the property of the association, and an inventory of the property;

(j) Except for alterations to a unit done by a unit owner other than the declarant, a copy of the declarant's plans and specifications utilized in the construction or remodeling of the condominium, with a certificate of the declarant or a licensed architect or engineer that the plans and specifications represent, to the best of their knowledge and belief, the actual plans and specifications utilized by the declarant in the construction or remodeling of the condominium;

(k) Insurance policies or copies thereof for the condominium and association;

(l) Copies of any certificates of occupancy that may have been issued for the condominium;

(m) Any other permits issued by governmental bodies applicable to the condominium in force or issued within one year before the date of transfer of control to the unit owners;

(n) All written warranties that are still in effect for the common elements, or any other areas or facilities which the association has the responsibility to maintain and repair, from the contractor, subcontractors, suppliers, and manufacturers and all owners' manuals or instructions furnished to the declarant with respect to installed equipment or building systems;

(o) A roster of unit owners and eligible mortgagees and their addresses and telephone numbers, if known, as shown on the declarant's records and the date of closing of the first sale of each unit sold by the declarant;

(p) Any leases of the common elements or areas and other leases to which the association is a party;

(q) Any employment contracts or service contracts in which the association is one of the contracting parties or service contracts in which the association or the unit owners have an obligation or a responsibility, directly or indirectly, to pay some or all of the fee or charge of the person performing the service;

(r) A copy of any qualified warranty issued to the association as provided for in RCW 64.35.505; and

(s) All other contracts to which the association is a party.

(2) Upon the transfer of control to the unit owners, the records of the association shall be audited as of the date of transfer by an independent certified public accountant in accordance with generally accepted auditing standards unless the unit owners, other than the declarant, by two-thirds vote elect to waive the audit. The cost of the audit shall be a common expense unless otherwise provided in the declaration. The accountant performing the audit shall examine supporting documents and records, including the cash disbursements and related paid invoices, to determine if expenditures were for association purposes and the billings, cash receipts, and related records to determine if the declarant was charged for and paid the proper amount of assessments.

[2004 c 201 § 10; 1989 c 43 § 3-104.]

RCW 64.34.405. Public offering statement — Requirements — Liability.

(1) Except as provided in subsection (2) of this section or when no public offering statement is required, a declarant shall prepare a public offering statement conforming to the requirements of RCW 64.34.410 and 64.34.415.

(2) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant pursuant to RCW 64.34.316 or to a dealer who intends to offer units in the condominium for the person's own account.

(3) Any declarant or dealer who offers a unit for the person's own account to a purchaser shall deliver a public offering statement in the manner prescribed in RCW 64.34.420(1). Any agent, attorney, or other person assisting the declarant or dealer in preparing the public offering statement may rely upon information provided by the declarant or dealer without independent investigation. The agent, attorney, or other person shall not be liable for any material misrepresentation in or omissions of material facts from the public offering statement unless the person had actual knowledge of the misrepresentation or omission at the time the public offering statement was prepared. The declarant or dealer shall be liable for any misrepresentation contained in the public offering statement or for any omission of material fact therefrom if the declarant or dealer had actual knowledge of the

misrepresentation or omission or, in the exercise of reasonable care, should have known of the misrepresentation or omission.

(4) If a unit is part of a condominium and is part of another real property regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this state, a single public offering statement, conforming to the requirements of RCW 64.34.410 and 64.34.415 as those requirements relate to all real property regimes in which the unit is located and conforming to any other requirements imposed under the laws of this state, may be prepared and delivered in lieu of providing two or more public offering statements.

[1989 c 43 § 4-102.]

RCW 64.34.410. Public offering statement — General provisions.

(1) A public offering statement shall contain the following information:

(a) The name and address of the condominium;
(b) The name and address of the declarant;
(c) The name and address of the management company, if any;
(d) The relationship of the management company to the declarant, if any;
(e) A list of up to the five most recent condominium projects completed by the declarant or an affiliate of the declarant within the past five years, including the names of the condominiums, their addresses, and the number of existing units in each. For the purpose of this section, a condominium is "completed" when any one unit therein has been rented or sold;
(f) The nature of the interest being offered for sale;
(g) A brief description of the permitted uses and use restrictions pertaining to the units and the common elements;
(h) A brief description of the restrictions, if any, on the renting or leasing of units by the declarant or other unit owners, together with the rights, if any, of the declarant to rent or lease at least a majority of units;
(i) The number of existing units in the condominium and the

maximum number of units that may be added to the condominium;

(j) A list of the principal common amenities in the condominium which materially affect the value of the condominium and those that will or may be added to the condominium;

(k) A list of the limited common elements assigned to the units being offered for sale;

(l) The identification of any real property not in the condominium, the owner of which has access to any of the common elements, and a description of the terms of such access;

(m) The identification of any real property not in the condominium to which unit owners have access and a description of the terms of such access;

(n) The status of construction of the units and common elements, including estimated dates of completion if not completed;

(o) The estimated current common expense liability for the units being offered;

(p) An estimate of any payment with respect to the common expense liability for the units being offered which will be due at closing;

(q) The estimated current amount and purpose of any fees not included in the common expenses and charged by the declarant or the association for the use of any of the common elements;

(r) Any assessments which have been agreed to or are known to the declarant and which, if not paid, may constitute a lien against any units or common elements in favor of any governmental agency;

(s) The identification of any parts of the condominium, other than the units, which any individual owner will have the responsibility for maintaining;

(t) If the condominium involves a conversion condominium, the information required by RCW 64.34.415;

(u) Whether timesharing is restricted or prohibited, and if restricted, a general description of such restrictions;

(v) A list of all development rights reserved to the declarant and all special declarant rights reserved to the declarant, together with the dates such rights must terminate, and a copy of or reference by recording number to any recorded transfer of a special declarant right;

(w) A description of any material differences in terms of furnishings, fixtures, finishes, and equipment between any model

unit available to the purchaser at the time the agreement for sale is executed and the unit being offered;

(x) Any liens on real property to be conveyed to the association required to be disclosed pursuant to RCW 64.34.435(2)(b);

(y) A list of any physical hazards known to the declarant which particularly affect the condominium or the immediate vicinity in which the condominium is located and which are not readily ascertainable by the purchaser;

(z) A brief description of any construction warranties to be provided to the purchaser;

(aa) Any building code violation citations received by the declarant in connection with the condominium which have not been corrected;

(bb) A statement of any unsatisfied judgments or pending suits against the association, a statement of the status of any pending suits material to the condominium of which the declarant has actual knowledge, and a statement of any litigation brought by an owners' association, unit owner, or governmental entity in which the declarant or any affiliate of the declarant has been a defendant, arising out of the construction, sale, or administration of any condominium within the previous five years, together with the results thereof, if known;

(cc) Any rights of first refusal to lease or purchase any unit or any of the common elements;

(dd) The extent to which the insurance provided by the association covers furnishings, fixtures, and equipment located in the unit;

(ee) A notice which describes a purchaser's right to cancel the purchase agreement or extend the closing under RCW 64.34.420, including applicable time frames and procedures;

(ff) Any reports or statements required by RCW 64.34.415 or 64.34.440(6)(a). RCW 64.34.415 shall apply to the public offering statement of a condominium in connection with which a final certificate of occupancy was issued more than sixty calendar months prior to the preparation of the public offering statement whether or not the condominium is a conversion condominium as defined in RCW 64.34.020(10);

(gg) A list of the documents which the prospective purchaser is entitled to receive from the declarant before the rescission period commences;

(hh) A notice which states: A purchaser may not rely on any representation or express warranty unless it is contained in the public offering statement or made in writing signed by the declarant or by any person identified in the public offering statement as the declarant's agent;

(ii) A notice which states: This public offering statement is only a summary of some of the significant aspects of purchasing a unit in this condominium and the condominium documents are complex, contain other important information, and create binding legal obligations. You should consider seeking the assistance of legal counsel;

(jj) Any other information and cross-references which the declarant believes will be helpful in describing the condominium to the recipients of the public offering statement, all of which may be included or not included at the option of the declarant;

(kk) A notice that addresses compliance or noncompliance with the housing for older persons act of 1995, P.L. 104-76, as enacted on December 28, 1995;

(ll) A notice that is substantially in the form required by RCW 64.50.050;

(mm) A statement, as required by RCW 64.35.210, as to whether the units or common elements of the condominium are covered by a qualified warranty, and a history of claims under any such warranty; and

(nn) A statement that the building enclosure has been designed and inspected as required by RCW 64.55.010 through 64.55.090, and, if required, repaired in accordance with the requirements of RCW 64.55.090.

(2) The public offering statement shall include copies of each of the following documents: The declaration, the survey map and plans, the articles of incorporation of the association, bylaws of the association, rules and regulations, if any, current or proposed budget for the association, the balance sheet of the association current within ninety days if assessments have been collected for ninety days or more, and the inspection and repair report or reports prepared in accordance with the requirements of RCW 64.55.090.

If any of the foregoing documents listed in this subsection are not available because they have not been executed, adopted, or recorded, drafts of such documents shall be provided with the public offering statement, and, before closing the sale of a unit, the

purchaser shall be given copies of any material changes between the draft of the proposed documents and the final documents.

(3) The disclosures required by subsection (1) (g), (k), (s), (u), (v), and (cc) of this section shall also contain a reference to specific sections in the condominium documents which further explain the information disclosed.

(4) The disclosures required by subsection (1) (ee), (hh), (ii), and (ll) of this section shall be located at the top of the first page of the public offering statement and be typed or printed in ten-point bold face type size.

(5) A declarant shall promptly amend the public offering statement to reflect any material change in the information required by this section.

[2005 c 456 § 19; 2004 c 201 § 11; 2002 c 323 § 10; 1997 c 400 § 1; 1992 c 220 § 21; 1989 c 43 § 4-103.]

RCW 64.34.415. Public offering statement — Conversion condominiums.

(1) The public offering statement of a conversion condominium shall contain, in addition to the information required by RCW 64.34.410:

(a) Either a copy of a report prepared by an independent, licensed architect or engineer, or a statement by the declarant based on such report, which report or statement describes, to the extent reasonably ascertainable, the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium;

(b) A copy of the inspection and repair report prepared by an independent, licensed architect, engineer, or qualified building inspector in accordance with the requirements of RCW 64.55.090;

(c) A statement by the declarant of the expected useful life of each item reported on in (a) of this subsection or a statement that no representations are made in that regard; and

(d) A list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations. Unless the purchaser

waives in writing the curing of specific violations, the extent to which the declarant will cure such violations prior to the closing of the sale of a unit in the condominium shall be included.

(2) This section applies only to condominiums containing units that may be occupied for residential use.

[2005 c 456 § 18; 1992 c 220 § 22; 1990 c 166 § 10; 1989 c 43 § 4-104.]

RCW 64.34.420. Purchaser's right to cancel.

(1) A person required to deliver a public offering statement pursuant to RCW 64.34.405(3) shall provide a purchaser of a unit with a copy of the public offering statement and all material amendments thereto before conveyance of that unit. Unless a purchaser is given the public offering statement more than seven days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, shall have the right to cancel the contract within seven days after first receiving the public offering statement and, if necessary to have seven days to review the public offering statement and cancel the contract, to extend the closing date for conveyance to a date not more than seven days after first receiving the public offering statement. The purchaser shall have no right to cancel the contract upon receipt of an amendment unless the purchaser would have that right under generally applicable legal principles.

(2) If a purchaser elects to cancel a contract pursuant to subsection (1) of this section, the purchaser may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his or her agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

(3) If a person required to deliver a public offering statement pursuant to RCW 64.34.405(3) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all material amendments thereto as required by subsection (1) of this section, the purchaser is entitled to receive from that person an amount equal to the greater of (a) actual damages, or (b) ten

percent of the sales price of the unit for a willful failure by the declarant or three percent of the sales price of the unit for any other failure. There shall be no liability for failure to deliver any amendment unless such failure would have entitled the purchaser under generally applicable legal principles to cancel the contract for the purchase of the unit had the undisclosed information been evident to the purchaser before the closing of the purchase.

[1989 c 43 § 4-106.]

RCW 64.34.443. Express warranties of quality.

(1) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(a) Any written affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(b) Any model or written description of the physical characteristics of the condominium at the time the purchase agreement is executed, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description except pursuant to *RCW 64.34.410(1) (v);

(c) Any written description of the quantity or extent of the real property comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

(d) A written provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful.

(2) Neither formal words, such as "warranty" or "guarantee," nor a specific intention to make a warranty are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty. A purchaser may not rely on any representation or express warranty unless it is contained in the public offering statement or made in writing signed by the declarant or declarant's agent identified in the public offering statement.

(3) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

[1989 c 428 § 2.]

RCW 64.34.445. Implied warranties of quality — Breach.

(1) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.

(2) A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:

(a) Free from defective materials;
(b) Constructed in accordance with sound engineering and construction standards;
(c) Constructed in a workmanlike manner; and
(d) Constructed in compliance with all laws then applicable to such improvements.

(3) A declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(4) Warranties imposed by this section may be excluded or modified as specified in RCW 64.34.450.

(5) For purposes of this section, improvements made or contracted for by an affiliate of a declarant, as defined in RCW 64.34.020(1), are made or contracted for by the declarant.

(6) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

(7) In a judicial proceeding for breach of any of the

obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. As used in this subsection, an "adverse effect" must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

(8) Proof of breach of any obligation arising under this section is not proof of damages. Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value.

[2004 c 201 § 5; 1992 c 220 § 26; 1989 c 43 § 4-112.]

Notes: Application -- 2004 c 201 §§ 5 and 6: "Sections 5 and 6 of this act apply only to condominiums created by declarations recorded on or after July 1, 2004." [2004 c 201 § 12.]

RCW 64.34.450. Implied warranties of quality — Exclusion — Modification — Disclaimer — Express written warranty.

(1) For units intended for nonresidential use, implied warranties of quality:

(a) May be excluded or modified by written agreement of the parties; and

(b) Are excluded by written expression of disclaimer, such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(2) For units intended for residential use, no disclaimer of implied warranties of quality is effective, except that a declarant or dealer may disclaim liability in writing, in type that is bold faced, capitalized, underlined, or otherwise set out from surrounding material so as to be conspicuous, and separately signed by the

purchaser, for a specified defect or specified failure to comply with applicable law, if: (a) The declarant or dealer knows or has reason to know that the specific defect or failure exists at the time of disclosure; (b) the disclaimer specifically describes the defect or failure; and (c) the disclaimer includes a statement as to the effect of the defect or failure.

(3) A declarant or dealer may offer an express written warranty of quality only if the express written warranty does not reduce protections provided to the purchaser by the implied warranty set forth in RCW 64.34.445.

[2004 c 201 § 6; 1989 c 43 § 4-113.]

RCW 64.34.452. Warranties of quality — Breach — Actions for construction defect claims.

(1) A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2) (b) of this section shall not expire prior to one year after termination of the period of declarant control, if any, under RCW 64.34.308(4). Such periods may not be reduced by either oral or written agreement, or through the use of contractual claims or notice procedures that require the filing or service of any claim or notice prior to the expiration of the period specified in this section.

(2) Subject to subsection (3) of this section, a cause of action or [for] breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(a) As to a unit, the date the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or the date of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(b) As to each common element, at the latest of (i) the date the first unit in the condominium was conveyed to a bona fide purchaser, (ii) the date the common element was completed, or (iii) the date the common element was added to the condominium.

(3) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

(4) If a written notice of claim is served under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the statutes of limitation in this chapter and any applicable statutes of repose for construction-related claims are tolled until sixty days after the period of time during which the filing of an action is barred under RCW 64.50.020.

(5) Nothing in this section affects the time for filing a claim under chapter 64.35 RCW.

[2004 c 201 § 7; 2002 c 323 § 11; 1990 c 166 § 14.]

RCW 64.34.455. Effect of violations on rights of action — Attorney's fees.

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

[1989 c 43 § 4-115.]

3. Federal Arbitration Act, 9 U.S.C. ch. 1. General Provisions

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transaction", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels,

collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction;

"commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction

for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such

method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Section 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 10. Same; vacation; grounds; rehearing

* (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

* (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

Section 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

* (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

* (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action. The judgment so entered shall have the same force and

effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Section 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 16. Appeals

* (a) An appeal may be taken from

* (1) an order

* (A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order

* (1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

4. Satomi, LLC's Petition for Review

Supreme Court No. _____
Court of Appeals No. 56265-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit Corporation,

Respondent

vs.

SATOMI, LLC, a Washington Limited Liability Company,

Petitioner.

SATOMI, LLC'S PETITION FOR REVIEW

Stellman Keehnel, WSBA # 9309
Kit W. Roth, WSBA # 33059
DLA PIPER US LLP
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044
Telephone: 206-839-4800
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I. IDENTITY OF PETITIONER

Petitioner is Satomi, LLC, a Washington limited liability company ("Satomi").

II. COURT OF APPEALS DECISION

On June 11, 2007, the Court of Appeals filed a published decision in *Satomi Owners Association v. Satomi LLC*, No. 56265-7-I. Copies of the Court of Appeals' majority opinion and dissenting opinion are attached as Appendix A. *See Satomi Owners Ass'n v. Satomi, LLC*, --- Wn. App. ---, 159 P.3d 460 (2007). This Petition for Review seeks review of the portion of the Court of Appeals' majority decision holding that a provision of the Washington Condominium Act, Chapter 64.34 RCW (the "WCA"),[1] calling for judicial enforcement of statutory condominium warranties is not preempted by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the "FAA").[2] No motion for reconsideration has been filed.

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[1] Attached as Appendix B is a copy of the former version of the relevant section of the WCA in effect at the time the Association filed its lawsuit (RCW §64.34.100 (2005)). Attached as Appendix C is the current version of RCW §64.34.100. The statute's amendments concern only non-binding arbitration. The statute's effect regarding binding arbitration provisions, such as the arbitration agreement at issue in this matter, remains unchanged.

[2] A copy of the FAA is attached as Appendix D.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the WCA's provision for judicial enforcement of statutory condominium warranties is not preempted by the FAA?[3]

IV. STATEMENT OF THE CASE

Satomi developed the Satomi Condominiums, a condominium complex comprised of 85 units in 18 buildings, located in Bellevue, Washington. Clerks Papers ("CP") 18. When each of those condominium units was sold, each purchaser signed a warranty addendum (the "Warranty Addendum") that states the various warranties Satomi was providing to the purchasers. CP 163-76, 1383-84. In the Warranty Addendum, the purchasers agreed to arbitrate any claims against Satomi for (1) breach of the warranties in the Warranty Addendum and (2) breach of *any other warranty* relating to the Satomi Condominiums. *See, e.g.*, CP 170. Despite that agreement, the purchasers' homeowners association, Respondent Satomi Owners Association (the "Association"), sued Satomi for breaches of warranties relating to the Satomi Condominiums and refused to arbitrate those claims as required by the Warranty Addendum.[4]

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[3] Since this legal question affects the validity of a State statutory provision, this Petition is also being served upon the Washington State Attorney General.

[4] The Association alleged defects in construction and construction materials and resulting damages throughout the Satomi Condominium complex, and, based on those allegations, the Association claimed that Satomi breached express and implied warranties under the

The Association filed a motion to quash Satomi's arbitration demand. CP 37, 18-106. Satomi opposed the Association's motion and cross-moved to compel arbitration, arguing that the FAA preempts the WCA's judicial enforcement provisions and requires arbitration of the Association's claims. CP 109-137.

The Superior Court granted the Association's motion to quash Satomi's arbitration demand, thereby denying Satomi's cross-motion to compel arbitration. CP 143-44. The Superior Court based its order in part on the erroneous conclusion that the FAA does not preempt the WCA's provision for judicial enforcement of the Association's WCA claims. CP 144. The Superior Court also denied Satomi's motion to reconsider. CP 1394-95.

Satomi appealed the Superior Court's orders quashing Satomi's arbitration demand and denying reconsideration. CP 1389-93, 1396-99. Satomi and the Association fully briefed and argued the issue of the FAA's preemption before the Court of Appeals. More than six months after the Court of Appeals heard oral argument, but before the Court of Appeals issued a decision on the appeal, Satomi and the Association reached a financial settlement. The Association then moved to terminate appellate review.

WCA and under the "Implied Warranty of Habitability" and thereby violated the Washington Consumer Protection Act, Chapter 19.86 RCW (the "CPA"). CP 3-9.

Satomi opposed termination of review because of the substantial public interest in the issue of the FAA's preemption and the arbitrability of condominium construction defect claims asserted under the WCA. Further evidencing that substantial public interest, the Master Builders Association of King and Snohomish Counties (the "MBA") and Blakely Village, LLC ("Blakeley Village") filed *amicus* briefing vigorously supporting completion of the Court of Appeals' review. *See* Appendix A, footnote 50. The MBA is the largest home builders association in the United States, founded to address issues affecting the housing industry. Blakely Village is Satomi's sister company and currently faces a similar lawsuit in King County Superior Court (No. 06-2-03941-6), in which the plaintiff homeowners association alleges construction defects in violation of the WCA but has refused to arbitrate those claims as required by the parties' arbitration agreement. The Blakely Village lawsuit was stayed pending the Court of Appeals' decision in this matter.

Concluding that the appeal involved recurring issues which should be determined, the Court of Appeals denied the Association's motion to terminate review and issued a 2-1 decision. *See* Appendix A, footnote 50. The majority's opinion holds that the Association's claims under the "Implied Warranty of Habitability" and the CPA are arbitrable, but that the Association's WCA claims are not arbitrable because the FAA does

not preempt the WCA's provisions calling for judicial enforcement of those claims, despite the fact that Congress intended the FAA to extend to the broadest reaches of Congress's Commerce Clause power. *See* Appendix A. The dissent strongly disagreed, concluding that the FAA's preemption of the WCA requires arbitration of the Association's WCA claims. *See* Appendix A.

Satomi has timely filed this Petition for Review, and the MBA has contemporaneously submitted an *amicus* memorandum supporting this Petition for Review, along with a motion for permission to file the *amicus* memorandum.

V. ARGUMENT

As more fully described in the MBA's *amicus* memorandum supporting this Petition for Review, this Court should accept review for the following reasons:

First, RAP 13.4(b)(3) provides for acceptance of review "[i]f a significant question of law under the Constitution ... of the United States is involved." Here, the FAA's preemption of the WCA turns on whether Congress's power under the Commerce Clause (Article I, § 8, cl. 3 of the United States Constitution) extends to regulation of construction defect claims arising out of Satomi's construction and sale of the Satomi

Condominiums. Thus, this Petition involves a significant question of law under the United States Constitution, and this Court should accept review.

Second, RAP 13.4(b)(1) provides for acceptance of review "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." The majority opinion published by the Court of Appeals in this case is in conflict with this Court's decisions recognizing the FAA's embodiment of a liberal federal policy favoring arbitration agreements and the FAA's broad reach to preempt contrary state law. *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341-44, 103 P.3d 773 (2004) (FAA preemption of a Washington statute reserving the right to a judicial forum for employment discrimination claims); *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 588-90, 681 P.2d 253 (1984) (FAA preemption regarding Washington State consumer protection and securities claims); *Allison v. Medicab Int'l.*, 92 Wn.2d 199, 203-04, 597 P.2d 380 (1979) (FAA preemption of Washington statute requiring a judicial forum for breach of franchise agreement claims). This Court's resolution of this conflict is imperative for proper application of the FAA by lower courts in Washington.

Finally, RAP 13.4(b)(4) provides for acceptance of review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The public interest is plainly

implicated here because (1) nearly all condominium sales in Washington include arbitration provisions similar to the arbitration provision at issue on this Petition;[5] (2) this Court's acceptance of review will provide proper guidance for Washington courts as to the enforceability of those arbitration provisions and will correct the Court of Appeals' erroneous limitation of the FAA's preemptive reach; and (3) the issue in the instant Petition is obviously likely to recur, as is evidenced by the Blakeley Village lawsuit, which is currently pending and involves the same issue. *See* Appendix A, footnote 50 (Court of Appeals holding that "the issues here will recur and should be determined..."). Thus, the Court's decision will benefit the public, for it will clarify the issue of whether arbitration clauses in condominium sales contracts are enforceable under the FAA in Washington.[6] *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (accepting review under RAP 13.4(b)(4) because "[t]he Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue").

[5] *See* Declaration of Leslie Williams in Support of Opposition to Respondent's Motion to Terminate Review By [Proposed] *Amicus* Master Builders Association of King and Snohomish Counties at ¶3, filed with the Washington State Court of Appeals, Division I on Jan. 19, 2007.

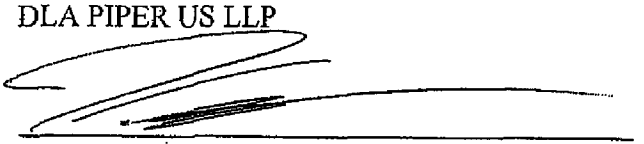
[6] As the Court of Appeals recognized and as more fully discussed in the MBA's *amicus* memorandum supporting this Petition for Review, the substantial public interest implicated by this petition also compels acceptance of review despite the parties' settlement.

VI. CONCLUSION

For the reasons stated above and in the MBA's *amicus* memorandum supporting this Petition for Review, Satomi respectfully requests that this Court accept review of the portion of the Court of Appeals' majority decision holding that the WCA's provision for judicial enforcement of statutory condominium warranties is not preempted by the FAA.

RESPECTFULLY SUBMITTED this 11th day of July, 2007.

DLA PIPER US LLP



Stellman Keehnel, WSBA # 9309
Kit W. Roth, WSBA # 33059
Attorneys for Petitioner Satomi, LLC

5. Washington Department of Financial Institutions, Interpretive Letter 03-01-CL

Washington State Department of
Financial Institutions

INTERPRETIVE LETTER

DIVISION OF CONSUMER SERVICES
STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
P.O. Box 41200
Olympia, Washington 98504-1200
Telephone (360) 902-8703
TDD (360) 664-8126
FAX (360) 664-2258
http://www.dfi.wa.gov/cs

TO CONSUMER LOAN LICENSEES

December 5, 2003

Interpretive Letter 03-01-CL

Re: Washington prohibition on prepayment penalties

Dear Consumer Loan Licensee:

This interpretive letter addresses the prohibition on prepayment penalties on loans made under Washington's Consumer Loan Act, Chapter 31.04 RCW (the Consumer Loan Act). Pursuant to WAC 208-620-130(7), "[a] licensee may not collect a prepayment penalty on any loan made at rates authorized by the act."[1]

In 1982, the United States Congress enacted the Alternative Mortgage Transaction Parity Act (AMTPA), 12 U.S.C. §§ 3801 – 3806, inclusive. AMTPA was intended to create parity among all residential mortgage lenders nationwide concerning the terms and conditions of "alternative mortgage transactions."[2]

Congress enacted AMTPA in the belief that federal regulation of alternative mortgage terms was necessary to allow lenders in the home equity lending market to compete on an equal footing with national banks and federal savings associations. Pursuant to 12 U.S.C. § 3803 of AMTPA, Congress delegated to three federal regulators the authority to implement and enforce regulations that would fulfill its legislative intent:

The Office of the Comptroller of the Currency (OCC) was given authority over banks;

The National Credit Union Administration (NCUA) was given authority over credit unions; and

The Office of Thrift Supervision (OTS) was given authority over federal savings associations, mutual savings banks, savings banks and non-chartered "state housing creditors."

The OTS has determined that leveling of the lending market as to alternative mortgages is no longer necessary. Pursuant to its authority under AMTPA, the OTS, on September 26, 2002, adopted and published amendments to 12 C.F.R. § 560.220 of its AMTPA regulations, effective January 1, 2003. One amendment affects "state housing creditors," including those licensed under the Consumer Loan Act. One of these amendments removes the federal preemption of state prohibitions on prepayment penalties with respect to alternative mortgage transactions. This limited federal preemption had provided most of our licensees with the ability to charge prepayment penalties on alternative mortgage transactions made under the Consumer Loan Act.

On December 6, 2002, the OTS delayed the effective date of the regulation to July 1, 2003. Thereafter, the National Home Equity Mortgage Association (NHEMA) filed a federal civil action to suspend implementation of the final rule. On July 14, 2003, the court in the case ruled in favor of the OTS. See **National Home Equity Mortgage Association vs. Office of Thrift Supervision**, 2003 U.S. Dist. LEXIS 12109 (U.S.D.C. – D.C., July 14, 2003).

Consequently, the Washington State rule prohibiting prepayment penalties on loans made at rates authorized under the Consumer Loan Act[3], is, on or after July 1, 2003, no longer preempted by the OTS AMTPA regulation. However, pursuant to the Depository Institutions Deregulatory and Monetary Control Act of 1980 (DIDMCA), at 12 U.S.C. §1735f-7a, creditors, as defined under that Act, continue to enjoy a federal preemption on first lien mortgage loans.

What does this mean to Washington consumer loan licensees?

Effective July 1, 2003:

1. Consumer loan licensees previously accessing the OTS AMTPA preemption that are "creditors" under DIDMCA are prohibited from collecting prepayment penalties on all junior lien mortgage loans and other non-mortgage loans made at rates authorized under the Consumer Loan Act; and
2. Consumer loan licensees that are not "creditors" under DIDMCA are prohibited from charging prepayment penalties on any loan made at rates authorized under the Consumer Loan Act.

The Department of Financial Institutions will review mortgage loans made under the Consumer Loan Act as of July 1, 2003, to determine compliance with the prepayment penalty prohibition pursuant to WAC 208-620-130(7). The improper inclusion of prepayment penalties in these loans will be cited as a violation. Refunds will be required where necessary, and there will be the potential of enforcement action taken against licensees violating this rule.

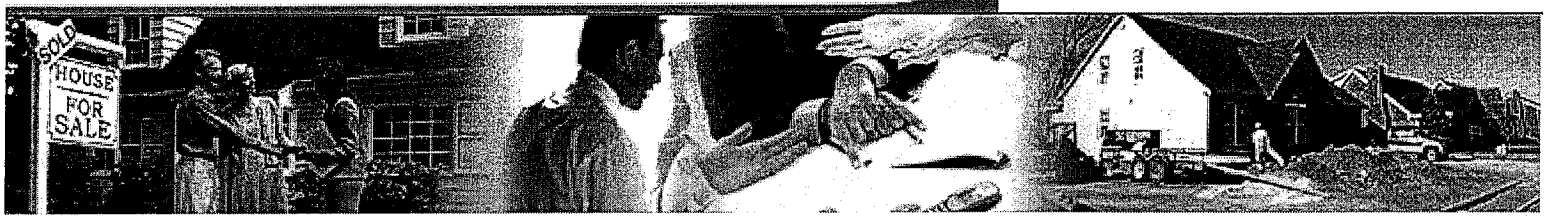
Please immediately modify your lending practices and documents to comply with this interpretive letter and make any appropriate refunds for prepayment penalties already collected in violation of the rule.

Sincerely,

Chuck Cross
Acting Director/Enforcement Chief

6. Office Location of Construction Arbitration Services, Inc.

CONSTRUCTION ARBITRATION SERVICES, INC



Contact Us

Case Administration Contact Information:

Home Warranty Cases
Toll Free (866) 727-8119 x114
Direct (586) 741-0874 x114
Fax (586) 790-4774

Home Inspection Cases
Private Contract Cases
Toll Free (866) 727-8119 x114
Direct (586) 741-0874 x114
Fax (586) 790-4774

Real Property Disclosure Cases
Toll Free (866) 727-8119 x103
Direct (586) 741-0874 x103
Fax (586) 790-4774

Office Contact Information:

Construction Arbitration Services
22500 Metropolitan Pkwy
Suite 200
Clinton Township, MI 48035
Toll Free (866) 727-8119
Direct (586) 741-0874
Fax (586) 790-4774

Washington Secretary of State SAM REED

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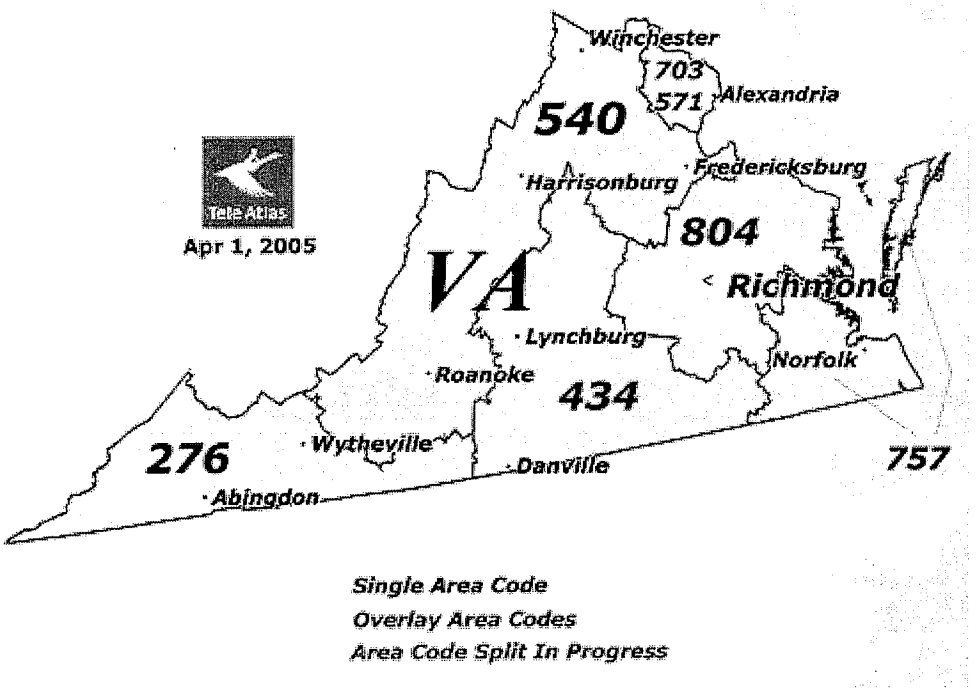
Washington Secretary of State
801 Capitol Way South
PO Box 40234, Olympia WA 98504-0234
(360) 753-7115

7. Area Code 703 Information

NANPA

Area Codes Map

VA - Virginia



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- **MAC Users** - Hold down button and select "download image to disk" in the box that pops up.
- Choose the folder on your computer where you wish to save it to.

Print Map | Close Window

NANPA

NPA Code Search Information

Below are the search results for NPA: **703**

General Information

Type of Code:	**General Purpose Code**
Is this code assignable:	**Yes**
If not, why:	
Geographic(G) or non-geographic(N):	**G**
If non-geographic, usage:	
Is this code reserved for future use:	**No**
Is this code assigned:	**Yes**
Is this code in use:	**Y**
Status:	
In service date:	**01/01/1947**
Planning Letter(s):	

Geographic Code information

Location:	**VA**
Country:	**US**
For a map of this NPA, please consult this planning letter:	
Time Zone:	**E**
Parent:	
Is this an overlay code:	**Yes**
Overlay Complex:	**703/571**
Jeopardy:	**No**
Relief Planning in Progress:	**No**

Dialing Plan for this NPA	Standard	Permissive
Home NPA Local Calls:	**10D**	**NA**
Foreign NPA Local Calls:	**10D**	**NA**
Home NPA Toll Calls:	**1+10D**	**NA**
Foreign NPA Toll Calls:	**1+10D**	

Last updated: July 27, 2007.